S. HRG. 98-1054

TO AMEND THE INDIAN LAND CONSOLIDATION ACT OF 1983

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

H.J. Res. 158

TO MAKE TECHNICAL CORRECTIONS IN THE ACT OF JANUARY 12, 1983
(PUBLIC LAW 97-459)

JULY 31, 1984
WASHINGTON, DC

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TO AMEND THE INDIAN LAND CONSOLIDATION ACT OF 1983

JULY 31, 1984

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room 366, Dirksen Senate Office Building, Senator Mark Andrews (chairman of the committee) presiding.

Present: Senators Andrews and Gorton.

Staff present: Paul Alexander, staff director; Peter S. Taylor, general counsel; Virginia Boylan, staff attorney; Debbie Storey, legislative assistant; Shiela Rogan, legislative aide; Elisa Geier, legislative assistant; June Tracy, legislative aide; Lynn Toledo, secretary; and Cynthia Abrams, SCIA intern.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON [presiding]. The bill we are considering this morning is House Joint Resolution 158, which makes technical corrections to the Indian Land Consolidation Act of 1983. That act passed during the lameduck session of 1982, and some portions of it were passed in a garbled form. While we have the opportunity to examine this measure again, we are going to address some of the concerns that have been raised about the act since its enactment.

As originally envisioned in the Senate, this bill was designed to deal with a fractionalized heirship situation for the Devil's Lake Sioux of North Dakota. It provided legislative authority to the tribe to establish a land consolidation program and provided for the restriction on the inheritance of trust property realty on that reservation. The House added a provision which gave the tribes nationwide authority which is very similar to that of the Devil's Lake Sioux. Testimony today will focus on the Indian Land Consolidation Act and the legislative proposals that were put forth at the last hearing.

Before we proceed, I will place a copy of House Joint Resolution 158 in the hearing record.

[The bill follows:]

II

98TH CONGRESS
1ST SESSION

H. J. RES. 158

IN THE SENATE OF THE UNITED STATES

APRIL 21 (legislative day, APRIL 18), 1983
Received; read twice and referred to the Select Committee on Indian Affairs

JOINT RESOLUTION

To make technical corrections in the Act of January 12, 1983 (Public Law 97–459).

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of January 12, 1983 (96 Stat. 2515; Public Law 97–459), is hereby amended as follows:

(i) At the end of section 204 change the period to a colon and insert the following: "*Provided,* That—

"(1) the sale price or exchange value received by the tribe for land or interests in land covered by this section shall be no less than within 10 per centum of the fair market value as determined by the Secretary;

"(2) if the tribal land involved in an exchange is of greater or lesser value than the land for which it is being exchanged, the tribe may accept or give cash in such exchange in order to equalize the values of the property exchanged;

"(3) any proceeds from the sale of land or interests in land or proceeds received by the tribe to equalize an exchange made pursuant to this section shall be used exclusively for the purchase of other land or interests in land;

"(4) the Secretary shall maintain a separate trust account for each tribe selling or exchanging land pursuant to this section consisting of the proceeds of the land sales and exchanges and shall release such funds only for the purpose of buying lands under this section; and

"(5) any tribe may retain the mineral rights to such sold or exchanged lands and the Secretary shall assist such tribe in determining the value of such mineral rights and shall take such value into consideration in determining the fair market value of such lands.

"(b) The Secretary must execute such instrument of conveyance needed to effectuate a sale or exchange of tribal lands made pursuant to an approved tribal land consolidation plan unless he makes a specific finding that such sale or ex-

change is not in the best interest of the tribe or is not in compliance with the tribal land consolidation plan.".

(ii) In section 206, strike all after "*Provided,* That in the event a tribe takes such action—" through the words

"(1) if an Indian dies intestate, the surviving non-Indian or nonmember spouse and/or children shall be entitled to a life estate in as much of the trust or restricted lands as he, she or they would have been entitled to take under existing law;"

and insert in lieu thereof:

"(1) if an Indian dies intestate, the surviving non-Indian or nonmember spouse and/or children shall receive a life estate in as much of the trust or restricted lands as he, she or they would have been entitled to take under existing law and the remainder shall vest in the Indians or tribal members who would have been heirs in the absence of a qualified person taking a life estate;".

(iii) In section 207, strike the word "descedent" and insert in lieu the word "descend".

Passed the House of Representatives April 19, 1983.

Attest: BENJAMIN J. GUTHRIE,

Clerk.

Senator ANDREWS. The first witness will be John Fritz, Deputy Assistant Secretary for Indian Affairs at the Department of the Interior, who has with him Mr. Wayne Nordwall. We are delighted to have you here, and you may proceed.

STATEMENT OF JOHN FRITZ, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY WAYNE NORDWALL, ATTORNEY AT LAW, DIVISION OF INDIAN AFFAIRS, OFFICE OF THE SOLICITOR, DEPARTMENT OF THE INTERIOR

Mr. FRITZ. Good morning, Mr. Chairman. Thank you very much for allowing the Department to appear before your committee and give our views and comments on House Joint Resolution 158, to make technical corrections in the act of January 12, 1983, Public Law 97-459.

I have submittted for the record a complete statement, and I would like to just give a brief verbal synopsis of that statement.

Senator GORTON. That is appropriate. Your entire written statement will be included in the record as if read.

Mr. FRITZ. Thank you very much, Mr. Chairman. Resolution 158, as stated, would merely correct errors in sections 204 and 206 of the Indian Land Consolidation Act, Public Law 97-459.

When I appeared before this committee on July 26, 1983, we recommended enactment of this resolution. In addition, we are now recommending amendments to the Indian Land Consolidation Act, which are attached to my full statement. We hope that with these amendments the tribes will have a better understanding of the act and opportunities for utilizing the act.

It has been said that the enactment of the Indian Land Consolidation Act was a significant legislative milestone in Indian affairs, and really was a logical second step to the innovations brought about by the Indian Reorganization Act of 1934. The current act was designed to help resolve the problems of fractionated heirship of Indian lands which arose as a result of various allotment acts, but in particular the Allotment Act of 1887. The Indian Reorganization Act stopped allotment and authorized land exchanges and reacquisitions for tribes and imposed some restrictions on the devise of trust lands to non-Indians. However, the Indian Reorganization Act was not a cure-all and applied only to those tribes who voted to accept it. Thus, the fractionated heirship problem continued to be a significant problem for Indian country. The Indian Land Consolidation Act attempts to resolve some of those problems on behalf of the tribes.

In the intervening 50 years since 1934, scores of bills were introduced to alleviate the problems of fractionated heirship. From our perspective, Public Law 97-459 culminates those years of efforts. Only one provision of the Indian Land Consolidation Act is absolutely mandatory for the tribes, and that is section 207, which concerns escheat of lands to the tribes. It has been stated by this administration and by other witnesses that this provision was necessary in order to resolve these problems.

Interim guidelines have been issued to the Bureau of Indian Affairs' area offices, and in addition, a section-by-section analysis,

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written for lay people, is in the final stage of preparation and will, in the very near future, be distributed to the field offices and to tribal officials as quickly as we can consummate the writing of this analysis.

Finally, this document should answer most of the questions. This lay-language analysis should answer most of the questions that have arisen as a result of the act and, together with the amendments of House Joint Resolution 158, should solve a number of problems on behalf of the tribes.

That concludes my prepared statement and synopsis, and I look forward to any questions you might have.

Senator GORTON. I have a series of questions which I understand were submitted to you yesterday. Have you received a series of questions from the committee?

Mr. FRITZ. Yesterday afternoon we did, yes.

Senator GORTON. I will go through those questions in order then, because you have some familiarity with them.

From the information developed in our first hearing on this bill and from research conducted by the staff of this committee, it would appear that the provision for escheat of minor fractional interest and trust or restricted property will result in substantial savings to the United States. Since the act has now been in effect for 1½ years, what is your estimate of the annual savings as a consequence of the escheat provisions?

Mr. NORDWALL. Senator, we have not had a chance to get an accurate estimate. We just got these questions relatively late yesterday afternoon. So all we can do is give some rough guesses right now, based on some earlier materials.

Last year when we came in, we estimated that approximately 2,000 interests would escheat in an average year, and this year so far I think we have received information from our field offices indicating that 1,221 have escheated so far. An estimate of costs would probably be between $40 to $50 per interest to maintain the estate records, the heirship cards, the leasing revenue-distribution records and things like that. So we are probably talking of somewhere on the order of about $80,000 a year.

We could not find any recent statistics because our probate people are having such a difficult time just keeping up with the existing records. They do not have time to provide other, more recent statistics. But in the Indian heirship study that was conducted in 1958, they estimated that there were 350,000 potential heirs, with each heir owning an average of 3.4 interests. When we ran our preliminary check in 1983 for the previous hearing, I think we came up with some number for the 12 biggest reservations of about 300,000 interests, half of which were less than 2 percent.

So I think the long-range projection would be that as those 2 percent interests are decreased, of course at the same time some of the 10 percent interests are going to go to 5 percent which will not escheat, so they will not be affected—the potential savings are in the millions ultimately. Right now, we are probably figuring $80,000 to $90,000 per year, based on a 2,000 interests per year escheat ratio.

Senator GORTON. What is the difference in the cost to the department between leasing and administering a highly fractionated

parcel of trust land as against a parcel in which title is essentially unified?

Mr. FRITZ. Essentially, the difference in the cost to the department of a highly fractionated interest of land would be that there are 20, 30, or 50 records on behalf of each individual heir, as opposed to 1 for 1. The cost really does not go down. as you do not get any economies of scale for keeping those massive numbers of records. So as Mr. Nordwall has indicated, if you had 20 people for example involved in one piece of property as opposed to one owner, you would have maybe a $40 or $50 per year recordkeeping requirement for the one person, as opposed to 50 times 20.

Senator GORTON. So it is not that the lease processes are different. It is simply that the recordkeeping is multiplied literally by the number of shares?

Mr. FRITZ. The recordkeeping is multiplied, and the lease process is just a horrendous issue because the lease requirements currently are that we would need to receive concurrence from all the people or as many of the people as we could find.

Senator GORTON. You do have to search them all out before you enter the lease in the first place?

Mr. FRITZ. There is a cartoon, and I do not know what book this came from, sir—oh, it came out of the 1958 heirship study. It shows *x* number of people's signatures needed for a lease. Some people did not answer, some people left no forwarding address, and so on. We will submit this for the record once again,[1] because I think this is an accurate description of the complexities of trying to find the people, trying to find out where they are and what they are currently doing.

Senator GORTON. Apparently, the department once considered paying fair market value to the heirs for fractional interests that were escheated but dropped the proposal for, among other reasons, the possible costs of appraisal. What is the average cost of appraisal, and does it differ if there are mineral or timber interests involved?

Mr. FRITZ. Mr. Chairman, we do not have with us today the average cost of appraisal. Our appraisal official for the Bureau of Indian Affairs was out of town yesterday, and as a result we do not have that cost. We will submit that for the record.[2] But suffice it to say that there is a difference if mineral or timber interests are involved, or if business activities are involved, because it does add some nuances to the appraisal process that would cause the cost to increase.

I also want to correct the impression in the minds of a lot of people that the possible cost of appraisal is essentially the rationale for us dropping the fair market value standard for escheat. That is incorrect, I guess, from the standpoint that our concern was not the cost of the appraisal but the cost of litigation that would arise out of the appraisal. We were fearful that a significant amount of litigation would arise out of the appraisal, since the appraisal really is a subjective standard as opposed to an objective one. The law, as passed, really focused upon an objective standard of income

[1] See page 15.
[2] See page 13.

generation as opposed to a subjective standard of what the property is worth, and that is very difficult to value on a lot of reservations.

Senator GORTON. Then if you had an objective standard, or if there were an objective standard written into the bill for the determination of these values that was not subject to litigation, you would not object to such payments?

Mr. FRITZ. Yes, and that is why the current standard is in there.

Mr. NORDWALL. I think that one way to get around this would be to say that any parcel of land that has not generated $100 has a presumptive value of x number of dollars, putting that into the bill and having a rebuttable presumption.

Senator GORTON. Would there not have to be litigation over that? There would have to be an irrebuttable presumption. I suppose some value with an irrebuttable presumption is better than just saying you do not get anything at all, from the point of view of the recipient.

Mr. NORDWALL. I think the point of the people who suggested that was to allow the Indians, if the secretary made an error, to present evidence. But if you made it an irrebuttable presumption, as you suggested, that would certainly decrease or eliminate any potential for litigation.

Senator GORTON. And the Indian heirs would be better off than they would be by saying that they get nothing at all?

Mr. NORDWALL. If you are going to pay them, right.

Senator GORTON. One method of appraising property is to examine comparable valuations for similarly located property. Is there any reason that the department could not simply estimate the value of a trust based on such a comparable figure as that used to determine fair market value of the fractional interest? I take it, the answer is the same: if that were the way prescribed in the act and would prevent litigation, it might be all right, but otherwise it would just lead to litigation?

Mr. FRITZ. Right. We do, Mr. Chairman, give valuations on a tract based upon comparable figures for estate purposes, but once the tract is going to be transferred or the interest is going to be leased or whatever, we do a full-blown appraisal at this juncture. We do use comparable value, just for estate purpose valuation.

Senator GORTON. You have recommended that the provision in section 205 authorizing the tribe to enact codes to restrict inheritance of trust lands be expanded to include all interest in trust or restricted lands within the tribe's jurisdiction and not just the interest of their own members. How would this authority compare with the restrictions provided in past statutes enacted for specific tribes?

Mr. NORDWALL. One of the problems with dealing with this act is that we have a different set of numbers in the statutes at large and in the code. The statutes at-large section is section 206, it is codified as section 2205.

The original bill did not have a restriction on who it tried to regulate. It merely said "any interest in trust or restricted land." The phrase "a member of that tribe" was added on the Senate side, for what reason I am not sure. On other bills, the Yakima, Quinnault,

Warm Springs, if I am recalling correctly, they run to any trust or restricted lands within the reservation boundaries.

In the 1958 report, of the 350,000 heirs who were identified at that time, 73 percent had an interest of some sort on another reservation other than their own. So there are substantial numbers of small interests spread out all over the country because of intermarriage and membership in different tribes.

Senator GORTON. Do you really want that restriction lifted?

Mr. NORDWALL. We do. I think that is suggested in our amendments.

Senator GORTON. Not having such a restriction does seem to be the pattern of specific tribe statutes?

Mr. NORDWALL. That is right.

Senator GORTON. It has been recommended that section 207 be amended to permit the tribes to develop their own code provisions to restrict the devolution of fractional interests in trust lands. Would the Department support such an amendment if the code provisions accomplish the same objective as that now in section 207 but simply through different means? [3]

Mr. NORDWALL. I think that is 206 actually, the heirship section, 207 is the escheat provision.

Senator GORTON. Well, 207 is what we mean, the escheat provisions. The question has to do with, would you favor allowing the tribes to have a code provision restricting the devolution of fractional interests in trust lands?

Mr. NORDWALL. There are two different sections involved with that. Section 207 is the escheat provision.

Senator GORTON. Right, but this would be an alternative to that. Instead of having small interests escheat, allow a tribal code to do with them what they would—in other words, not let them get so small.

Mr. FRITZ. Mr. Chairman, I apologize. This is such a technical application.

Mr. NORDWALL. Let us defer it then. Why don't you think about it and submit your answer in writing.

Mr. FRITZ. If we could, because Congress has seen fit to give the tribes, under section 206, the opportunity to establish their own codes. Frankly, I think we need to look at your question and see how it fits in with respect to the specific language as found in 206 and as it works through to 207.

Senator GORTON. Senator Melcher has two questions which he has submitted. I will read them to you.

Assume that one person has an undivided interest in 40 percent of a trust allotment but that the other 60 percent is owned by 10 or more interests, and these other interests choose to sell under the provisions of this bill. How are the interests of the single large interest owner to be protected?

Mr. NORDWALL. Under the existing bill, in the situation you have just described, it would be protected because the bill only applies to parcels that have 15 or more owners. So if you have one owner with 40 percent and 10 other owners owning the rest, they do not qualify under this bill to try and purchase that land.

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[3] See page 13.

Senator GORTON. Then let us say that 16 own the other 60 percent.

Mr. NORDWALL. Under the existing bill, the way it is drafted, if there are three or more owners that own an aggregate of 50 percent and they object, it cannot be sold. So if you have one owner with 40 percent and the other 15 owners own 60 percent, and they agree to sell, then it would sell.

Senator GORTON. Are there provisions for partition, and if so, to what extent have they been used in the past to consolidate land holding?

Mr. NORDWALL. There are no specific partition provisions in this act. There are other general statutory provisions that the secretary has for partitioning. The big problem is that the statute says that the partition has to be to the advantage of the heirs. In most cases, if you have a highly fractionated allotment out on the Great Plains, for instance, that is a grazing lot, if you partition out 2 percent and give the guy 0.8 acre, the thing is essentially valueless because there is no way to get across to it, and you can not drill a well, and it is not even big enough for a house site. On the other hand, if it is a mineral estate and it can be partitioned to the mutual advantage of all of the heirs, then the bureau does have the authority to do that. To what extent that has been used I really do not have any figures on it, but there are existing authorities for partitioning. They are not in this statute; they are in other statutes.

Senator GORTON. I would like to thank both of you. You will, as promptly as you can, submit supplementary answers and answer the questions you are unable to deal with today?

Mr. FRITZ. We certainly will. Thank you, Mr. Chairman.

[The prepared statement follows:]

PREPARED STATEMENT OF JOHN W. FRITZ, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and Members of the Committee, I am pleased to be here today to further discuss the views of the Department on H.J. Res. 158, "To make technical corrections in the Act of January 12, 1983 (Public Law 97-459)."

As when I appeared before this Committee on July 26, 1983, we recommend enactment of H.J. Res. 158.

Section 1 of H.J. Res. 158 would insert in section 204 of Public Law 97-459 a proviso which was mistakenly included in section 206 of the Act and would strike the erroneous proviso from section 206. In addition, an insertion in section 206 would clarify the disposition of remainder interests after expiration of life estates.

Mr. Chairman, in addition to the amendments to the Indian Land Consolidation Act (ILCA) which H.J. Res. 158 proposes, we are suggesting additional amendments which are clarifying and technical in nature. We hope that with these amendments the tribes will have a better understanding of the Act. A list of our suggested amendments is attached.

As we stated previously, we strongly believe that the enactment of the Indian Land Consolidation Act was a legislative milestone in Indian affairs.

The need for Land Consolidation legislation had its origin primarily in the various allotment acts, especially the General Allotment Act of 1887 (25 U.S.C. 331 et seq.). The allotment acts provided that Indians would be individually allotted portions of their tribal lands and that surplus tribal lands would be sold to homesteaders. This eventually resulted in a "checkerboard" pattern of Indian and non-Indian land ownership within many reservations, and in a complex pattern of "fractionated" land ownership.

This particularly serious problem of fractionated heirship results because the heirs or devisees of allotment owners receive undivided common interests in the allotment. Through the generations, upon the death of successive heirs or devisees,

ownership has passed to scores or hundreds of individuals, resulting in numerous tracts of land that are so highly fractionated that they are incapable of producing any significant economic benefit to their numerous owners. For the Bureau of Indian Affairs, the administration of such land is prohibitively complex and expensive, as the Bureau is responsible for maintaining records on thousands of minimal interests in land, and distributing the income received from such land among the numerous owners.

For these reasons, a comprehensive land consolidation authority for tribes was necessary. Prior to ILCA, the statutory authority used most often in this connection was provided by sections 4 and 5 of the Indian Reorganization Act (25 U.S.C. 461), and section 1 of the Oklahoma Indian Welfare Act (25 U.S.C. 501). However, these Acts did not include all the tribes served by the Secretary of the Interior. With respect to those tribes to which such Acts do apply, these statutes give the Secretary authority to accept gifts of land for tribes and allow exchanges of lands, but do not provide authority for the sale of tribal lands held in trust by the United States. In order to limit further fractionation, authority for the tribes to regulate the devise and descent of interests in trust lands was also necessary. In recent years, a number of tribes have requested and received special legislative authority to carry out land consolidation programs and to regulate inheritance on their reservations. It was the intent of P.L. 97-459 to provide a single comprehensive law governing land consolidation and heirship.

In the intervening year and a half since the enactment of ILCA, many questions have been raised about the Act. A section-by-section analysis of the Act is in the final stage of preparation and will be distributed to our field units and tribal officials. This document should answer most of the questions that have arisen as a result of the Act, and serve as interim implementing instructions.

Apparently, tribes have been somewhat reluctant, thus far, to take advantage of some of the provisions in ILCA. We have not received any word of tribes implementing section 204 (providing for sales and exchanges) or section 206 (restricting devise or descent of property to tribal members). Both of those sections require action and planning by the tribal governing body. Some tribes are taking advantage of section 205 which is an acquisition section designed to allow tribes to acquire fractionated tracts of land on a more liberal basis than has been permitted under previous existing statutes and regulations. We hope that once the tribes understand the benefits that ILCA can provide, that they take advantage of its provisions.

We still believe that the Act is workable, and is a necessary addition to Indian land laws. We favor the law and its purposes.

This concludes my prepared statement. I will be pleased to answer any questions you or members of the Committee may have.

SUGGESTED AMENDMENTS TO H.J. RES. 158, "TO MAKE TECHNICAL CORRECTIONS IN THE ACT OF JANUARY 12, 1983 (P.L. 97-459)

On page 3 of H.J. Res. 158 add the following new paragraph:

"(iv) In section 206, after the word "interest", strike the words "of a member of such tribe".

Explanation.—In its present form, tribes have the authority to prevent nonmembers of the tribe or non-Indians from inheriting by devise or descent, interests in tracts of land owned by tribal members. There are many instances of Indians from one tribe owning land within another's reservation. Many tribes feel that since the land is located within their reservation and under their jurisdiction, this section should not be restricted to its members.

Also, add the following new paragraph:

"(v) In section 206, proviso (3), at the end of the last sentence, add the following:

Any ineligible devisee shall also have the right to renunciate his devise in favor of a person or persons eligible to inherit."

Explanation.—This provides a further option on the part of ineligible heirs and in keeping with the spirit of the Act, retains ownership in Indians.

Also, add the following new paragraph:

"(vi) In section 207 strike all after the words "in such tract" and insert in lieu thereof the words "and has earned to its owner less than $100 in each of the immediate five years preceding the death of its owner." *Provided,* That this section shall not apply to any interest that will descend or is devised to a person that already owns an interest in the tract of trust or restricted land. *Provided further,* That in the event an interest subject to this section involves a public

domain allotment not under the jurisdiction of a tribe, such interest shall be divided, proportionately according to their interests, among the remaining owners of the tract."

Explanation.—This section has been very controversial especially in relation to the earning capacity of a particular interest in a tract. This controversy has been generated because of temporary economic conditions, for example, tracts with timber or mineral interests temporarily not in production. We feel that by taking a 5-year "lookback" this will allow for a fairer evaluation of the true economic value and take into consideration depressed economic conditions which may have occurred in a particular year or years. In addition, in many instances a prospective heir may already own an interest in land, but will not inherit under the existing language. Since the intent of section 207 is to aggregate small interests, this intent will be enhanced by a proviso allowing such interests to pass to heirs who already own an interest in the tract. The second proviso would prevent the further fractionation of public domain allotments by distributing interests subject to this section among the remaining owners of the tract.

Also, add the following new paragraph:

"(vii) In section 209 after the word "title" insert the words "or other authority", and at the end of section insert the words "and issue the appropriate title documents".

Explanation.—This section was intended to give the Secretary authority to issue title or land conveyance documents for transactions consummated under ILCA as well as for transactions involving individual Indian authorized by any other provisions of law. As presently drafted, this intent is unclear as a literal reading seems to merely restate what is already existing law.

Finally, add the following new paragraph:

"(viii) In section 211 strike the word "Federal".

Explanation.—Tax exemptions contained in other statutes are limited to State and local. It is fairly certain that Federal exemption was not intended. To distinguish those tracts that are subject to ILCA and Federal tax exemption from those trust tracts subject to tax exemption through other statutes, would be quite a task.

[Subsequent to the hearing the following correspondence was received for the record:]

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

WASHINGTON, D.C. 20245

IN REPLY REFER TO:

SEP 11 1984

Honorable Mark Andrews
Chairman, Select Committee on Indian
Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

During the July 31 hearing on H.J. Res. 158, a resolution "To make technical corrections in the Act of January 12, 1983 (Public Law 97-459)," we were requested to provide additional information concerning (1) the average cost of an appraisal performed by the Bureau of Indian Affairs, and (2) whether the Department would support an amendment to section 207 of the Indian Land Consolidation Act "to permit tribes to develop their own code provisions to restrict the devolution of fractional interests in trust property."

First, the actual cost of an appraisal varies greatly depending on the area in which the land being appraised is located and what type of an appraisal is being conducted, e.g., grazing land, timber, minerals, etc. We estimate the average cost per appraisal to be approximately $350.

Second, our misunderstanding at the hearing of the question concerning whether we would support an amendment to section 207 arises from the fact that section 206 authorizes tribes to set criteria for the devolution of land, if they enact a tribal heirship code or ordinance, by limiting who can inherit land. On the other hand, section 207 is an absolute bar to the devolution of certain interests in land if that interest amounts to 2 percent or less of the interests in a parcel of land and which has earned less than $100 in income in the year preceding the death of the owner. In other words section 206 deals with who can inherit, and section 207 deals with what can be inherited. Thus, an ordinance fixing heirs, as contemplated by section 206, would have no impact on section 207. However, having reviewed the transcript of the hearing, it appears that the question was directed toward authorizing tribes to change the escheat criteria in section 207 rather than further definition of who is entitled to inherit such interests.

The criteria, 2 percent and $100, were chosen merely as a compromise among several figures considered by congressional staff members during the drafting of the Indian Land Consolidation Act. The Department would consider supporting an amendment authorizing tribes to alter the escheat

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criteria within certain parameters in order to take care of special problems on a particular tribe's reservation. For example, the existing section 207 could be amended by adding the following proviso at the end thereof:

> "Provided, that any tribe may, by appropriate action of its governing body, subject to the approval of the Secretary, change the size of the interest subject to escheat and/or change the amount of income that must be earned to prevent a parcel from escheating; Provided further, that no such ordinance shall be approved which provides for the escheat of an interest smaller than x percent or larger than y percent, or sets the income earned to its owner at less than $x or more than $y."

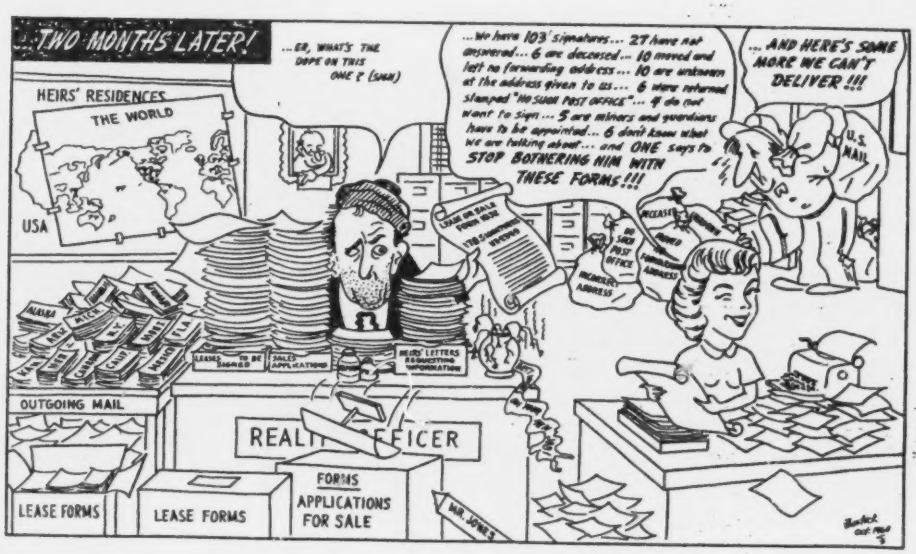
However, we would not support an amendment that would allow a tribe to completely eliminate applicability of section 207 to its reservation. The reason section 207 was made the only mandatory provision in the Indian Land Consolidation Act was to ensure that some minimal step would be taken toward eliminating the fractionated heirship problem. Although making this decision was difficult, we believe the approach taken by the existing provision is correct and necessary in order to alleviate the problems caused by highly fractionated heirship lands.

We hope this information will be useful to you. If we can be of further assistance, please let us know.

Sincerely,

Deputy Assistant Secretary -
Indian Affairs (Operations)

A Dramatization of Problems in Obtaining Heirs' Signature on Sales and Lease Forms


TWO MONTHS LATER!
...ER, WHAT'S THE DOPE ON THIS ONE? (SNAP)
...We have 103 signatures... 27 have not answered... 6 are deceased... 10 moved and left no forwarding address... 10 are unknown at the address given to us... 6 were returned stamped "NO SUCH POST OFFICE"... 4 do not want to sign... 5 are minors and guardians have to be appointed... 6 don't know what we are talking about... and ONE says to STOP BOTHERING HIM WITH THESE FORMS!!!
...AND HERE'S SOME MORE WE CAN'T DELIVER!!!
HEIRS' RESIDENCES
THE WORLD
USA
U.S. MAIL
OUTGOING MAIL
LEASE FORMS
LEASE FORMS
FORMS
APPLICATIONS FOR SALE
MR. JONES

Senator GORTON. We will now hear from Mel Sampson, the chairman of the Yakima Nation Legislative Committee, accompanied by Joe Pinkham and Peter Batzle.

You are welcome here. Your entire written statement will be included in the record as if read. At this point, Mr. Sampson, you may proceed.

STATEMENT OF MEL SAMPSON, CHAIRMAN, YAKIMA NATION LEGISLATIVE COMMITTEES, CONFEDERATED TRIBE OF THE YAKIMA NATION, TOPPENISH, WA, ACCOMPANIED BY JOE J. PINKHAM, VICE CHAIRMAN, YAKIMA NATION GENERAL COUNCIL; AND PETER BATZLE, ATTORNEY AT LAW, KARL A. FUNKE AND ASSOCIATES

Mr. SAMPSON. Good morning, Mr. Chairman. As you indicated, my name is Mel Sampson, and I am the chairman of the legislative committee of the Yakima Tribal Council. On behalf of the Yakima Tribe I would like to thank you for this opportunity to make our views represented here as they pertain to the Land Consolidation Act.

As you know, our reservation is located in the south central State of Washington, encompassing approximately 1.3 million acres of land, and the tribe currently owns over 842,000 acres of that land, of which 275,000 acres of that land is allotted to our individual tribal members and about 250,000 acres of that land is currently owned by non-Indians. This gives us a distinct indication of the importance the Land Consolidation Act will play on our reservation.

Unfortunately, though, experience shows that the Land Consolidation Act as it has been written does not allow the Yakima Tribe to participate in this land acquisition process because of the operation of the current Land Enterprise Act. The Yakima Act does not allow the tribe to place acquired fee lands into trust. Section 203 of 25 U.S.C. 22002 of the Land Consolidation Act extends the IRA land provisions to the non-IRA tribes such as Yakima, but section 203 also specifically does not supersede any provision of Federal law that allows specific tribes to acquire land. We have drafted an amendment to the Indian Land Consolidation Act that would remove this statutory restriction and have submitted it to the Senate Select Committee for your consideration.

Ideally, the Yakima Land Enterprise could then adopt these provisions of the Yakima Land Consolidation Act that would allow acquired fee land to be put into trust. To my knowledge, the Yakima Act is the only land act that contains the prohibition that does not allow us to place fee land back into trust status. That is our first concern.

Our second area of concern is the mandatory escheat of small, fractionated parcels of land to the tribes. The problems of the fractionalization of ownership of the individually owned trust and restricted lands cannot be overstated. What section 207 does not do is compensate those landowners whose land is escheated. In our testimony, we recommend some kind of compensation, and we stipulate $250, but we will address that a little further later.

Also, the mineral and timber interests of these small interests in land could have significant value. As you know, the Yakima Reservation has a large holding of timber, and I think this would be a major factor as far as our consideration of small ownership and timber allotments. People whose land escheats to the tribe should be compensated for mineral or timber interests. If a tribe develops its own escheat plan that is approved by the Secretary of the Interior, the tribe should be allowed to substitute that plan for section 207 of the act. The tribes could set their own levels of compensation if allowed to develop their own escheat plans. We have drafted an amendment to the Land Consolidation Act that will allow tribes the opinion of developing their own escheat plans and submitting them to the Secretary of the Interior for their approval. Once approved, the plans would supersede section 207 of the Indian Lands Consolidation Act.

This, I think, would be further representative as well as putting into motion the realization of self-determination. It also reflects that as 207 is currently written, it is a very distinct reflection that something drafted for the sake of administrative simplicity does not take into consideration what reality is out on the reservation level.

Another area of great concern to the Yakima Indian Nation that is not addressed by the Land Consolidation Act is the problem of mortgaged individual trust lands passing out of trust if there is a foreclosure on the mortgage. This happens now even if the tribe is the lender because of the operation of 25 U.S.C. 483(a), which requires that all mortgaged trust land pass out of trust upon foreclosure. It also requires that all foreclosure proceedings take place in State court, even if the tribe holds the note on the land. This statute also does not require the appearance of the United States as a necessary party in a foreclosure proceeding in a State court.

The Yakima Tribal Credit Program currently holds lien on approximately 6,000 acres through our credit program, of which some portion of those 6,000 holdings conceivably could be subject to foreclosure, but due to this statute where we have to go through State court procedure in taking the trust land into fee status to realize this, we elect not to at this point of time because of this procedure.

We have developed an amendment to the Indian Land Consolidation Act that would, hopefully, solve this problem of mortgage land passing out of trust status upon foreclosure. Our amendment would still allow individual owners of trust lands to mortgage the land, subject to approval by the Secretary of the Interior, with any foreclosure proceeding still taking place in the State court if the entity making the loan was not the tribe. The United States would be a necessary party to such proceedings. If the tribe was the lender, any foreclosure proceedings would take place in the tribal rather than the State court.

Another feature of our proposed amendment is that the tribe will have the option of purchasing any trust land that is foreclosed upon in a tribal or State court. If the tribe does not exercise its option to purchase the land, the Bureau of Indian Affairs will satisfy the mortgage and hold the land for a period of 5 years to allow the tribe to acquire the land. If the tribe does not indicate a desire

to purchase the land within the 5-year period, the Bureau can dispose of the land.

Included with our testimony, Senator, is a copy of our current approved land enterprise operation plan as it was amended in 1976. Attached to that as well is a copy of the last fiscal year's financial operation report. We have also included a copy of our tribal credit program operation manual and a copy of last fiscal year's financial operation report.

This concludes our prepared testimony, and we will be glad to try to entertain any questions you have.

Senator GORTON. Thank you, Mr. Sampson. How much land has the Yakima Nation acquired in fee status under the 1955 act?

Mr. SAMPSON. Since the inception of the current approved land enterprise language program, which was implemented in 1953, we have acquired approximately 25,000 acres of fee patent land. Now, you must bear in mind that this 25,000 acres does not include trust properties purchased from allottees in lieu of them taking them out of fee patent status. But in answer to your question, fee patent land is approximatly 25,000 acres.

Senator GORTON. Is all of that within the exterior boundaries of the reservation?

Mr. SAMPSON. The majority of it is. There have been a few instances. We have tribal members who have trust property holdings under the Vancouver allotments down along the Columbia River area, and then between the reservation and the Columbia River. There have been some isolated instances of their trust property purchases.

Senator GORTON. How much is paid in taxes on land acquired in that fashion per year?

Mr. SAMPSON. I have to qualify that question. Currently, as of last year's operating financial report, we are paying right now approximately $9,000. I will qualify that by stating that all of the 25,000-acre fee-patent land that was purchased by virtue of the tribe borrowing $9 million under the FHA Act, which allows us to convert the fee-patent land back into trust, what we are currently paying tax on now is land that was not able to be converted into trust because we ran out of the $9 million.

Senator GORTON. How many acres would that be representative of, the $9,000 in year-end taxes?

Mr. SAMPSON. Approximately 3,341 acres.

Senator GORTON. In correspondence to this committee, you indicated that the provisions of section 204 authorizing a tribe to sell trust land and to acquire replacement land in trust may not be applicable to the Yakima Nation. Have you received an opinion from the Department of the Interior on that question, on the applicability of section 204 to the Yakima Reservation?

Mr. SAMPSON. Unfortunately that statement is not really a true statement, and I apologize for however it got to you. We currently have the authorization to sell trust property to our tribal members under the Yakima Act, and it is within our operation plan, as you will see, that has been submitted to you. We do not have, as has been indicated, pursuant to the Yakima Act—if we purchase fee-patent land, it has to remain fee-patent land, and it is applicable to the tax structure of the State.

Senator GORTON. Your statement indicates that the Yakima Nation currently has mortgages on 6,000 acres of trust land which will be subject to foreclosure. What is the total amount of acreage currently subject to tribal mortgages?

Mr. SAMPSON. Six thousand acres.

Senator GORTON. So it is all subject?

Mr. SAMPSON. Right. To further expand on that, it is conceivable that some of our tribal members who own trust property can utilize that trust property for security purposes, for borrowing money through other lenders aside from the tribe. We do not have any record of how many there are, but we know of instances where this has happened. Now, through the process that I stated earlier in our testimony, if foreclosure procedure were to process today, then the trust property then would have to go into fee patent status to be able to be processed through the State court proceedings.

Senator GORTON. You recommend an amendment to section 207 to allow tribes to adopt their own code provisions for escheat of minor fractional interests in trust land. Obviously, there is more than one way to achieve an objective. Would you support an amendment if it provided that the limitation on inheritance in the tribal code could be no less restrictive than that provided in section 207?

Mr. SAMPSON. Initially, yes. We realize that essentially a line has to be drawn somewhere, and we are experiencing and recognize the content of what this is trying to solve. Yes, we would support that. Our draft plan probably would not be any less restrictive, but our principal concern mostly is the compensation factor. We obviously have a concern about due process, as far as the land holders are concerned. Those are the two main areas that we have received through the tribe system criticism from our tribal members.

Senator GORTON. At the beginning of your testimony, in describing the reservation, you pointed out that it totals just over 1,367,000 acres, with about 843,000 acres owned by the tribe, 275,000 allotted to individual Indians, and a little over 249,000 owned by non-Indians. Let us concentrate first on the latter. Is the land within the exterior borders of the reservation owned by non-Indians most contiguous to the reservation boundaries and to other privately owned land, or is it checkerboarded throughout the entire 1,367,000 acres?

Mr. SAMPSON. It is checkerboarded, but the concentration of the checkerboard lies within the valley area that is under irrigation. In most respects, it is farmland. But we do have some isolated instances within our closed area, our timbered area. As a matter of fact, the lovely State of Washington owns a chunk up there and a large timber company, I think Boise Cascade, owns some up there, plus some nonenrollees own some up there in some instances which, I may add, is creating some very severe complications.

Senator GORTON. So there is some of that private land that is very much surrounded by tribally owned land.

Mr. SAMPSON. Totally, yes.

Senator GORTON. By the same token, land in the valley where most of it may be private, there is checkerboarded within that, trust allotted lands and tribally owned property as well?

Mr. SAMPSON. That is correct.

Senator GORTON. What about the 175,000 allotted acres, allotted to members of the tribe? Is that checkerboarded and scattered throughout the entire reservation, or does that tend to be concentrated down in the valley as well?

Mr. SAMPSON. It is scattered throughout, more so than the example I just stated. There are a number of allotments that are within the timbered area, and likewise within the farm-related area as well. It is probably scattered more so throughout the reservation.

Senator GORTON. Thank you all very much for being with us today.

[The material submitted follows:]

PREPARED TESTIMONY OF THE YAKIMA INDIAN NATION, PRESENTED BY MEL SAMPSON AND JOE J. PINKHAM

Good morning, Mr. Chairman. My name is Mel Sampson. I am a member of the Yakima Tribal Council and Chairman of our Legislative Committee. Accompanying me here today, is Mr. Joe J. Pinkham, Vice Chairman of the General Council of the Yakima Indian Nation. On behalf of the Yakima Indian Nation, I would like to thank you for this opportunity to testify here today.

The Yakima Indian Nation was created as a political entity by the treaty of June 9, 1855, which was ratified on March 8, 1859 and proclaimed on April 18, 1859 establishing the Yakima Indian Reservation. The reservation is located in southern Washington state. The total area of the reservation is 1,367,105 acres. The Tribe owns 842,978 acres and 274,988 acres are allotted to individual Indians. Non-Indians own 249,416 acres.

The Indian Land Consolidation Act has several purposes. The first is to extend the provisions of the Indian Reorganization Act (IRA) which allows IRA tribes to put fee land the tribe has acquired into trust to non-IRA tribes. Yakima is a non-IRA tribe.

Unfortunately, the Land Consolidation Act, as written, does not allow Yakima to participate in this land acquisition process because of the operation of the Yakima Land Enterprise Act (25 USC § 608 et. seq.), a land acquisition act passed originally in 1955 by Congress to allow Yakima to purchase lands within the Yakima Reservation or ceded areas. The Yakima Act does not allow the tribe to place acquired fee lands into trust. Section 203 (25 USC § 2202) of the Indian Land Consolidation Act extends the IRA land provisions to non-IRA tribes such as Yakima, but Section 203 also specifically does not supercede any provision of federal law that allows specific tribes to acquire land. Because of this restriction, Yakima cannot, at this time, take advantage of the Indian Land Consolidation Act's provisions concerning the acquisition of land.

We have drafted an amendment to the Indian Land Consolidation Act that would remove this statutory restriction and are submitting it to the Senate Select Committee on Indian Affairs. This amendment would simply remove the prohibition aganist placing fee land into trust status now found in the Yakima Land Enterprise Act.

Ideally, the Yakima Enterprise Plan could then adopt those provisions of the Indian Land Consolidation Act that allow acquired fee land to be put into trust. To my knowledge, the Yakima Act is the only land act that contains a prohibition against placing fee land into trust status.

A second area of concern is the mandatory escheat of small fractionated parcels of land to the tribes. The problem of fractionation of ownership of individually owned trust and restricted land cannot be overstated. Section 207 of the Indian Land Consolidation Act attempts to resolve this problem by having small fractional interests of land escheat to the tribes. This is a necessary response to the problem. What Section 207 does not do is to compensate those whose land is taken by escheat. A small payment of $250.00 should be paid to those whose land escheats to the tribe.

Also, mineral or timber interests of these small interests in land could have significant value. People whose land escheats to the tribe should be compensated for mineral or timber interests.

If a tribe develops, its own escheat plan that is approved by the Secretary of the Interior, the tribe should be allowed to substitute that plan for Section 207 of the Act. The tribes could set their own levels of compensation if allowed to develop their own escheat plans. We have drafted an amendment to the Land Consolidation Act that would allow tribes the option of developing their own escheat plans and sub-

mitting them to the Secretary of the Interior for approval. Once approved, the plan would supercede Section 207 of the Indian Land Consolidation Act.

An area of great concern to the Yakima Indian Nation that is not addressed by the Indian Land Consolidation Act is the problem of mortgaged individual trust land passing out of trust if there is a foreclosure on the mortgage. This happens now even if the tribe is the lender because of the operation of 25 USC § 483(a), which requires that all mortgaged trust land pass out of trust upon foreclosure. 25 USC 483(a) also requires that all foreclosure proceedings take place in state court, even if the tribe holds the note on the land. This statute also does not require the appearance of the United States as a necessary party in a foreclosure proceeding in state court.

The Yakima Tribal Credit Program lends money to tribal members to purchase trust land. There is approximately 6,000 acres of trust land that the credit program has not foreclosed on because the action will have to take place in state rather than tribal court with the land passing out of trust status upon foreclosure.

We have developed an amendment to the Indian Land Consolidation Act that would hopefully solve this problem of mortgaged land passing out of trust status upon foreclosure.

Our amendment would still allow individual owners of trust land to mortgage their land, subject to approval by the Secretary of the Interior, with any foreclosure proceeding still taking place in State court if the entity making the loan was not the tribe. The United States would be a necessary party to such proceedings.

If the tribe was the lender, any foreclosure proceeding would take place in tribal, rather than State court.

Another feature of our proposed amendment is that the tribe will have the option of purchasing any trust land that is foreclosed upon in tribal or State court. If the tribe does not exercise its option to purchase the land, the Bureau of Indian Affairs will satisfy the mortgage and hold the land for a period of five years to allow the tribe time to acquire the land. If the tribe does not indicate a desire to purchase the land within the five year period, the Bureau can dispose of the land. All income from the land during the five year period would be applied to the costs of managing the land and the cost of paying off the mortgage. The land in question would remain in trust status during this five year period. If the tribe did not purchase the land from the Secretary, the land would be regarded as having vested to the Secretary in fee simple and the Secretary would be free to sell the land.

This process would prevent the loss of thousands of acres of trust land.

Mr. Chairman, I would again like to thank you for this opportunity to testify and I will be more than happy to answer any questions you or other Committee members may have.

Amendment to the Act of January 12, 1983, P.L. 96-459, Title II § 201, 96 Stat. 2517 "Indian Land Consolidation Act" (25 USCS § 220, et. seq.).

Section 203 of the Act is amended to read:

SEC. 203. The provisions of Section 5 of the Act of June 18, 1934 (48 Stat. 985), shall apply to all tribes notwithstanding the provisions of Section 18 of such Act. Provided, That nothing in this section is intended to supercede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s). Subsection (c) of Section 1 of P.L. 88-540 (78 Stat. 747) is hereby repealed and the provisions of Sec. 5 of the Act of June 18, 1934 (48 Stat. 985) concerning the Secretary's authority to take lands into trust shall be applicable to Sec. 1 of P.L. 88-540 (78 Stat. 747).

Amendment to the Act of January 12, 1983, P.L. 96-459, title II § 201, 96 Stat. 2517 "Indian Land Consolidation Act" (25 USCS § 220, et. seq.)

Section 207 of the Act is amended to read:

SEC. 207. No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 percentum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat: Provided, that if a tribe has a land escheat program approved by the Secretary such tribe has the option to operate under the provisions of such plan in lieu of the requirements of Section 207 of the Act.

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AMENDMENT TO THE INDIAN LAND CONSOLIDATION ACT

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled that the Act of March 29, 1956, Chapter 107, 70 Statutes at Large 62, codified at 25 U.S.C. 483a, is hereby repealed.

SEC. 2. The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land.

SEC. 3. If such land is mortgaged to or a deed of trust is issued by an Indian tribe, such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the tribe. Such land will continue to be held by the United States in trust and any restriction on alienation will remain undiminished.

If such land is mortgaged to or a deed of trust is issued by an entity other than an Indian tribe, such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the State in which the land is located. For the purpose of a foreclosure or sale proceeding that does not take place under tribal law, the United States shall be a necessary party to the proceeding.

SEC. 4. The Indian tribe whose reservation or ceded area contains the land involved in the foreclosure proceeding will have the first right of refusal to acquire such land. If the tribe does not exercise its option to purchase such land, the Secretary of the Interior shall satisfy the mortgage or deed of trust and hold such land in trust for a period of up to five years. Any income derived from such land during the period the Secretary so holds such land shall be applied by the Secretary to cover the costs of managing the land and credited against the expenditure by the Secretary in satisfying the balance of the mortgage or deed of trust.

At any point during this five year period, the tribe may pay the balance of the unrecovered costs to the Secretary and acquire such land.

If, during the five year period, the tribe indicates a desire to acquire such land, the Secretary may hold such land for up to an additional two year period.

SEC. 5. If an Indian tribe acquires such land from an individual Indian or from the Secretary of the Interior, such land shall continue to be held in trust by the United States for the tribe.

If the Indian tribe does not exercise its option to purchase the land at the foreclosure proceeding or during the five or two year periods mentioned in Section 4, the land shall be regarded as having vested to the United States in unrestricted fee simple title and the Secretary may divest himself of the land at his discretion.

[The remainder of the material submitted by Mr. Sampson is retained in the files of the committee.]

Senator GORTON. We will hear next from Alvin Ward and Benjamin Snyder, from the Shoshone Indian Tribe, accompanied by Marvin Sonosky.

Mr. SONOSKY. Mr. Chairman, with your permission, Caleb Shields from the Assiniboine Sioux Tribe on the Fort Peck Reservation will also join us.

Senator GORTON. We will be delighted to have him.

STATEMENT OF MARVIN SONOSKY, ATTORNEY AT LAW, SONOSKY, CHAMBERS, SACHSE & GUIDO, WASHINGTON, DC, ON BEHALF OF THE STANDING ROCK SIOUX TRIBE

Mr. SONOSKY. Mr. Chairman, my name is Marvin J. Sonosky, and I am an attorney in Washington, DC. I have filed a prepared statement, and I have testified before the committee before on this matter, and I have met with the committee staffs of the House and the Senate on this problem. With the Chair's permission, I should like to offer my statement for the record.

Senator GORTON. Your statement will be included in the record.

Mr. SONOSKY. Rather than testify, I suggest that the delegates from out of town be permitted to make their statements, and then if there are any questions, I will be glad to answer them.

Senator GORTON. Fine. You may proceed.

[The prepared statement follows:]

PREPARED STATEMENT OF MARVIN J. SONOSKY

My name is Marvin J. Sonosky, I am a partner in the law firm of Sonosky, Chambers, Sachse & Guido in Washington , D.C.

I thank the Chairman and the Committee for arranging this second hearing on House Joint Resolution 158. H.J.Res. 158 was introduced primarily to make nonsubstantive corrections in Title II of the Indian Land Consolidation Act of January 12, 1983 (25 U.S.C. 2201 et seq.). The need for correction arose because, as adopted, Title II contained scrambled language and there is doubt as to whether it can be successfully administered in its scrambled condition.

This is the second hearing before this Committee on H.J. Res. 158. The Committee held the first hearing a year ago following the complaints of Indian tribes that the Senate had enacted Title II without hearings before this Committee. Following last year's hearing, the Committee staff gave the matter further intensive study and prepared a memorandum recently made available to the tribes. The memorandum undertakes to set out the various views expressed to the Committee and provides a basis for further consideration at this second hearing.

Title II is represented as the solution to an administrative problem. The Bureau of Indian affairs complains that it is costly and burdensome to probate the estates of Indian decedents with small fractional interests in trust land and that it is expensive and uneconomical to administer land held in highly fractionated ownership. If the problem can be solved the Government will save large sums of money. Title II is intended to provide the solution without spending any Government money. Title II would do this by extinguishing the fractional interests by sale, or by escheat to the tribes.

The tribes agree that feeding the fractional interest into tribal ownership will halt fractionalization. The tribes are concerned that Title II will not accomplish that objective. The tribes view the Title II solution as designed largely to satisfy the administrative objective, at the expense of substantive rights of the tribes and of individual Indian landowners. The tribes believe that the Title II solution will open the say for removing the trust status from tribal and individual land and minerals.

The fair and honorable solution calls for the purchase of highly fractional interests by the tribes. But tribes are without funds to buy a significant part of outstanding fractional interests. While the Bureau makes the point that Title II will save the United States vast amounts of public funds by removing the burden of administering fractional interests, Title II makes no part of those savings available for the purchase of fractional interests so that over a period of years the fractionalization problem could be cured.

I turn now to particular features of Title II as discussed in the memorandum prepared by the Committee staff. All references are to Title II unscrambled.

Definition of "Indian"—Section 202, (25 U.S.C. 2202).—The tribes object to that portion of the definition of an "Indian" that specifies that an Indian is "any person who is recognized as an Indian by the Secretary of the Interior". The objection is that the language is loose and sets no criteria to guide the Secretary's determination. Indians have no way of knowing whether the Secretary will or will not recognize as "Indians" their nonmember spouses or children. Without that knowledge tribal members will seek a fee patent so as to be sure that the land will pass to nonmember children and spouses. This weakens the trust land base.

The staff memorandum notes that the Title II definition appears in the special legislation for the Standing Rock Tribe. The implication is that the definition works. The staff memorandum overlooks the testimony from the Standing Rock Tribe that "there have been a number of cases where an Indian has requested a fee patent so that he can leave his land to his Indian nonmember children. This occurs because the BIA has no procedure for determining whether a particular person is an Indian and the Indian landowner is not certain whether his children will be permitted to inherit after he dies." (Hearings, July 26, 1983, p. 53, Statement of Frank Lawrence.)

The Title II definition of "Indian" should contain standards to guide the Secretary's determination of who is an Indian. A number of standards were suggested to the Committee. (See suggested redraft of Section 201(4), Hearings, p. 30). The staff

memorandum is silent on these suggestions. The Secretary now must recognize that a person of Indian blood is an Indian in order to receive services from the Bureau of Indian Affairs or the Indian Health Service; that such a person must be an Indian if the United States holds, or has held property in trust for him. To this should be added the classic definition that a person of Indian blood is an Indian if he is recognized and regarded as such in the community in which he lives. Finally, probably the best judge is the governing body of the tribe. Recognition as an Indian by that body should at least carry weight.

As I see it, the Secretary himself would consider at least some of the criteria I outlined, in testing whether to recognize a person as an Indian. If that is so, and if, as avowed, a purpose of Title II is to protect the trust land base, what harm is done in setting the standards in the statute so that parents will know whether or not their children will, or will not, be recognized as Indians by the Secretary of the Interior.

Tribal power to sell or exchange tribal land—Section 204.—Section 204 opens the way to impair the tribal land base in order to reduce the administrative burden of dealing with fractionated interests. This it does by authorizing tribes to sell or exchange tribal lands, including minerals, so that the tribe can either acquire fractional holdings "or" consolidate tribal land. The plain correlative language of Section 204 could be interpreted to permit a tribe to sell solid blocks of tribal land in order to buy fractional interests without regard to consolidation.

Further, the consolidation feature is no deterrent. The staff memorandum conceives a consolidation area to be a limited area within which a tribe must purchase land with the receipts from the sale of other tribal land. Examination of tribal land consolidation plans now in force will reveal that it is common to find that the entire reservation, or virtually the entire reservation, is encompassed in the land consolidation area. For purposes of Title II, the Bureau already has proposed the very broadest possible definition of a tribal consolidation area. The Bureau defines "Tribal consolidation area" under Title II to mean "the area or areas described in the tribe's land consolidation plan". (Memorandum, March 17, 1983, Deputy Assistant Secretary to all Area Directors.)

Finally, the sale and exchange of tribal land simply perpetuates the fractionalization problem. The tribal land, in most instances will be sold, or exchanged with, individual Indians giving birth to a new line of fractional interests.

Tribes do not want the general power to alienate their land. That power has been withheld from tribes as a national policy since before the Constitution and for good reason. The staff memorandum suggests that if the tribes do not want the power to sell or exchange, they need not adopt a land consolidation plan under Title II. This completely overlooks the proposition that if a power is present, greed, corruption and pressure invite its use. The staff memorandum to the contrary, Indian tribes do not agree that the approval of the Secretary provides "significant safeguards" against external pressures. In fact, Indian tribes know that the pressure often comes from within the Department. History teaches that it is the Department, responding to pressure, that led to the tribal loss of vast timber and mineral holdings. The phrase "approval of the Secretary" has high-principled implications. But tribes know that the Secretary's authority is exercised at the echelon on the reservation where the pressure is the greatest. Protection from this very pressure brings the tribes to urge the Committee not to open up the way for tribes to sell and exchange their lands and thus remove almost 200 years of Federal protection against alienation by tribes. On balance, the tribal power to sell is not needed to help cure the fractionated heirship problem.

If there must be a provision empowering tribes to sell or exchange tribal land, it should be limited to the surface rights in isolated tracts as determined by the Secretary. We have suggested that isolated lands be defined as lands that are completely surrounded by fee land. The staff deems this definition too inflexible. In the alternative we suggest that the Secretary be empowered to define an isolated tract as one that is so situated that it cannot be economically used or developed by the tribe. This would cover the situation where one or more boundaries of tribal land was bordered on trust land.

Sale or exchange of tribal mineral rights—Section 204.—Here again Title II removes protection from tribal minerals for the avowed purpose of aiding the Government to be shed of fractional interests. Perhaps some justification can be found for requiring individuals to sell fractional mineral interests, so as to give the Government administrative relief. But there is no reason for a tribe to convey minerals to individuals and thus rejuvenate the very fractional division that Title II is supposed to wipe out.

More important, undeveloped mineral interests, should not be sold because undeveloped mineral interests, particularly oil and gas, cannot be validly appraised. The Section 204 language reciting that the Secretary will assist in appraising undeveloped minerals, especially oil and gas, simply says he will help appraise the unappraisable. The staff argument that tribes are free to retain minerals, shifts the burden. The protection should be designed for the Government's wards not to help out the trustee. If there is a tract of tribal land that an entrepreneur has reason to believe is valuable for oil and gas, the Committee may be sure that there will be a plan afoot to work out arrangements for the sale, or exchange of that tract, ostensibly for its surface use, but in fact to get title to the oil and gas.

There is no conceivable justification for a tribe to sell its minerals. And Congress should not permit it on the erroneous representation that it will help the Bureau administer fractional interests. Minerals should be excluded from the alienation features of Title II.

Tribal purchase of trust lands from owners of less than a majority interest—Section 205.—Under Title II, if there are at least 15 heirs, tribes may purchase trust lands when either 50% of the heirs or 50% of the interest in the land agree to sell, provided that the tribe purchases all of the fractional interests. If the objective is to get rid of fractional interests, then the same objective should not encourage fractionalization. For that reason the 15-heir provision really makes no sense. If any heir, whether he is one of fifteen, or one of three, wishes to sell his interest in the land to the tribe, the tribe should be free to buy it. To the extent the tribe buys that fractional interest, it brings to a halt fractionalization and ends all future cost to the Bureau of Indian Affairs.

We commend the staff in recognizing the merit of the position that the majority ownership, not the majority of owners control consent to sell. (Memorandum, p. 20.) Under Title II as it now reads, if four brothers each own 1/5th interest and the remaining 1/5th is owned by 12 grandchildren, tribal purchase is authorized if 9 of the 12 grandchildren agree to the sale. The staff memorandum seems to agree with that viewpoint.

Tribal purchase of fractional interests regardless of the number of heirs—Section 205.—We are pleased that the staff memorandum seems to agree that it is quite unfair to call for escheat of small fractional interests and at the same time prevent their sale to the tribe, as is the case under the Bureau's current present regulations. (Memorandum, pp. 20–21.) Those regulations, in general, require the tribe to purchase all, or none, of the fractional interest in most cases. This regulation raises tribal suspicion as to the Bureau's representations that Title II is designed to cure an administrative problem. For at least the last 50 years the Bureau administratively could have permitted tribes to buy fractional interests as they became available. The Bureau chose to insist on the tribal purchase of all or none of the fractional interests—and still does.

Right of an owner of a fractional interest "in actual use and possession" to match the tribal offer for the land—Section 205.—This matching provision should be limited to owners of fractional interests who are "in actual use and possession" for a period of at least two years, immediately preceding the time of the tribe's offer to purchase. Under the present language the owner of a highly fractional interest can go into possession after the tribe makes its offer to purchase and match the tribe's offer.

The present language will encourage collusion. Non-Indians who are interested in obtaining title to trust land on the reservation, will work out plans with Indian owners of highly fractional interests to front for acquisition of the land after the tribe makes its offer. The Indian will take title, secure a fee patent and convey to the non-Indian sponsor. We read the staff memorandum to agree with us in principle. (Memorandum, p. 21.)

Tribal inheritance codes—Section 206.—We are pleased that the staff memorandum (pp. 22–23) agrees that the authority of a tribe to enact inheritance codes should cover all trust or restricted land within the reservation and should extend to all Indians and not just to members of the tribe.

Limitation of life estates—Section 206.—Under Section 206 where a tribe adopts an inheritance code and a tribal member dies intestate, a life estate is given to the surviving non-Indian or nonmember spouse and children in what they would have received if they had been able to inherit.

The staff memorandum (pp. 23–24) is somewhat ambivalent but seems to defend this provision. On one hand the staff memorandum in its examples horrible (pp. 3–4) points to deceased Indians who die leaving small fractional interests in 18 different allotments. At the same time the staff memorandum contends that the surviving non-Indian or nonmember spouse and children should have a life estate in the same

18 fractional interests in the 18 allotments. Life estates for spouses under state law, generally are limited to the homestead and that should be the controlling factor. The non-Indian or nonmember surviving spouse should be protected by a life estate in the homestead.

Escheat—Section 207.—This section has proved to be very disturbing to the tribes and their people. The staff memorandum suggests that the section should be modified to provide that a presumption of escheat should arise if (a) the fractional interest is minimal in size—not more than 2% of the total acreage in a tract, and (b) the amount of income earned over a 5-year period preceding the period of escheat indicates no significant economic value. Of course this puts the burden on the individual Indian to overcome the presumption. At the same time it saves the United States the expense of appraisal.

I am not aware of any escheat statute that is predicated on the size of an heir's interest, or the income from the decedent's land. I have read the single district court decision upholding the validity of Section 207. *Irving* v. *Watt* (D.S.D. 1983) unreported. In that case the district court followed the established law that a legislative body is empowered to limit the right of inheritance. But the question of whether heirship can be denied on the basis of the size or value of the interest was not addressed by the court and may not have been submitted. This exposes Section 207 to the charge that it denies equal protection of the law to all heirs in the same class.

Assuming size and economic value are legal tests, the evidence of value should not be limited to income. A tract of land believed to be valuable for oil and gas may produce no income. A tract with timber that ultimately will be cut may be valuable but produces no income. Land located near an urban center may be potentially highly valuable for commercial development, but produces no income. No formal appraisal should be necessary. In addition to income the Bureau should certify not only that the tract has not generated the requisite income within the statutory period but that the tract does not contain timber resources, is not believed to be valuable for oil, gas, or other minerals, and is not so located as to give it special value.

CONCLUSION

The Committee is urged to amend Title II—

1. To redefine "Indian".
2. To limit the tribal power to sell on exchange land to the surface only of isolated tracts as defined.
3. To permit tribes to buy fractional interests without buying all fractional interests and regardless of the number of heirs.
4. To restrict the right to match a tribal offer to Indians in possession at least two years preceding the tribes offer to purchase.
5. To extend tribal inheritance codes to all trust land and to all Indians.
6. To limit life estates of nonmember or non-Indian spouses to the homestead.
7. To provide the suggested safeguards for the escheat section.

Mr. SONOSKY. May I introduce Mr. Alfred Ward and Mr. Benjamin Snyder, both of whom are members of the Shoshone Business Council, the governing body of the Shoshone Indian Tribe of the Wind River Reservation. On my left is Mr. Caleb Shields, who is a member of the Fort Peck Tribal Executive Board, the governing body of the Assiniboine and Sioux Tribes on the Fort Peck Reservation, MT.

Senator GORTON. Mr. Ward, you may proceed.

STATEMENT OF ALVIN WARD AND BENJAMIN SNYDER, MEMBERS, SHOSHONE INDIAN TRIBAL BUSINESS COUNCIL, WIND RIVER RESERVATION, WY

Mr. WARD. Mr. Chairman and members of the committee, my name is Alfred Ward. The gentleman with me today is Benjamin Snyder, Sr. We are both members of the Shoshone Business Council, the governing body of the Shoshone Tribe of the Wind River Indian Reservation.

We just testified at this committee's previous hearing concerning needed amendments to title II of the Indian Land Consolidation Act, and I appreciate the opportunity to make additional comments.

Since the hearing last year, the committee staff prepared a memorandum explaining the background of title II and discussing the amendments proposed by us and other tribal representatives. We appreciate the staff's thorough consideration of the amendments that we suggested. However, we are concerned because title II would allow the tribe to sell land and minerals. As leaders of the Shoshone Tribe, we understand very well the importance of minerals to the tribe and its members.

Our tribe earns substantial income every year from oil and gas. We use this income to make monthly per capita payments to our members and those per capita checks are the backbone of our economy. The oil and gas income also provides tribal government and tribal programs for the benefit of our people.

We have accomplished this all through careful use of our tribal oil and gas. Based on our experience, we do not understand how this could be in the tribe's best interest to sell or exchange tribal land and minerals. Yet, title II allows the tribes to sell these minerals.

The staff memorandum says that the tribes will be protected because the secretary must take the minerals into account in determining fair market value. This is no protection because no one can make a reliable appraisal of the undeveloped oil and gas lands. Title II gives schemers and speculators a golden opportunity to go after tribal oil and gas.

We urge the committee to amend the act so that the tribes cannot sell tribal land except possibly isolated tracts, and then only surface rights. We are concerned that if the staff view becomes law, the act will permit tribes to sell any tribal lands or interest in lands. The Shoshone Tribe is strongly opposed to any sale of tribal land.

We have spent years building up our tribal land base, and we have been quite successful. There are powerful interests outside that would like to get their hands on our land and minerals. We do not want an act of Congress that lets people apply pressure and their influence to get the tribes to sell.

According to the staff memorandum, we have nothing to worry about because if we do not adopt the land consolidation plan, we cannot sell any land. However, the same people who would like to buy our land would try to get us to adopt a plan. Once the plan was adopted, sale of land could be engineered. Secretarial approval would not protect us either, because the approval decisions are made by officials who are often subject to outside pressures. A wide-open power to sell tribal land is just too risky.

The tribal authority to sell should be restricted to isolated tracts of little economic benefit and only to the surface. Title II should be amended to limit the power to sell the surface, only to isolated tracts. Title II allows the tribes to purchase fractional interests under certain conditions. We agree that the best way to eliminate fractional interest is to turn back to the tribes by means of purchase. However, title II makes it difficult for the tribes to purchase

fractional interests. For example, title II requires the tribes to purchase all fractional interests in a tract.

This all-or-none policy is how the Bureau, the BIA, operates now. If over the years the Bureau had let the tribes purchase fractional interests as they became available, the problem the Bureau now complains about would be halfway solved. At the hearing last year, we urged the committee to cut out of title II all the obstacles to the purchase of fractional interests. We are pleased that the staff memorandum appears favorable to our suggestion along these lines.

Title II would allow tribes to purchase fractional mineral interests along with the surface. The staff seems to feel that fractional mineral interests should be eliminated because they are just too expensive for the Bureau to administer. We believe that the rights of individual Indians are more important than the Bureau's convenience. So does the Bureau. Right now, on our reservation, the Bureau does not permit individual Indians to sell their mineral interests, either with the surface or minerals alone. Title II should carry out the same policy.

We urge the committee to protect the rights of individual Indians by amending title II to require that the surface stay with the heirs when fractional interests are sold. We will be pleased to answer any question you may have. Thank you.

Senator ANDREWS [presiding]. Thank you very much for an excellent and very complete statement. I think you have made the record quite complete, and we appreciate that.

Our next witness is Caleb Shields, a member of the Fort Peck Tribal Executive Board. It is good to have you here, Mr. Shields. Your prepared statement is filed in its entirety, and it will appear in the record in full as though read.

STATEMENT OF CALEB SHIELDS, MEMBER, TRIBAL EXECUTIVE BOARD, ASSINIBOINE AND SIOUX TRIBES, FORT PECK RESERVATION, MT

Mr. SHIELDS. Thank you, Mr. Chairman, for inviting the Fort Peck Tribes back to testify. We do appreciate the intent of Congress and the committee in trying to increase the tribal land holdings. However, the Land Consolidation Act has caused a lot of problems on our reservation.

A year ago, our tribal chairman, Norman Hollow, testified at this committee on the Consolidation Act. At that time, our tribal chairman recommended a repeal of title II of the act. We feel that it should not have passed without extensive field hearings. That is still the position of the Fort Peck Tribes, to repeal title II.

First of all, for simplicity's sake, I would like to give a picture of the Fort Peck Reservation and the problem of heirship holdings.

The reservation is approximately, in round figures, 2 million acres: 1 million acres is in fee patent, approximately 1 million acres is Indian Land. Of that 1 million acres of Indian land, approximately 60 percent of that or 600,000 acres is allotted land and 400,000 acres would be tribal land. Of the allotted land, the 600,000 acres, the committee report here shows that about 44 pecent of

that 600,000 acres would eventually escheat to the tribe. That was a figure in the memorandum of 44 percent.

We do have a serious problem at Fort Peck on the heirship problem. We do not feel that the act covers all the necessary requirements. First, on the sale of tribal land, Fort Peck Tribes do not want this power. We do not want it, and we do not need it. We feel that tribes never gain by trading their capital assets for money. Also, we feel that Congress should not support a law that exposes tribes to pressure to sell their lands.

The sale of minerals can never be in a tribe's best interest. We would like to see one example where it was in the tribe's best interest.

We feel that the power to sell tribal lands should be limited to isolated tracts, minus mineral interests.

When we talk about the purchase of heirship interests, the real problem lies in finding money to purchase that land. We have acquired, through FHA loans over the years, approximately $5 million to purchase allotted lands from Indian members. There never seems to be enough money, if you are looking for land acquisition moneys, available, especially through the FHA or anywhere else, and especially low-interest, long-term funds.

Title II and the purchase of heirship interests essentially was adopted for the Government's benefit. We feel that the Government should provide funds for the purchase of fractional interests, and that could be done through long-term, low-interest grant loan type programs that could be made available to the tribes.

In the area of escheat of small fractional interests to the tribes, we, as many other tribes do, strongly oppose this provision. To take land away from living heirs, we feel, is pretty strong medicine in any language or in any country, and people should have the opportunity to sell their land to the tribes minus the minerals.

In the area of the definition of Indian, we object to the act's definition. It will force tribal members to seek fee patents in order to save their land for their children. This, we feel, would be detrimental to stopping land from going out of trust. The two main definitions of Indian, we feel, would be recognition by the tribal government and recognition by the community at large as the two most important factors

Mr. Chairman, as I testified earlier, on the amount of allotted land on the reservation, 600,000 acres owned by the individuals and 400,000 by the tribes. With the escheat provision, it was estimated that 4 percent of the allotted land would be escheated to the tribes. If you wait for this escheat provision to take its course, an instance of 200, 100, 150 heirs, ownership by 100 or 200 people is very normal on our reservation. The escheat provision is a piecemeal action, and you could be waiting for generations or quite awhile before that land would ever revert to the tribe. We still feel that land purchase would be the simplest and easiest solution under some type of a loan grant type of program.

[The prepared statement follows:]

PREPARED STATEMENT OF CALEB SHIELDS, MEMBER, TRIBAL EXECUTIVE BOARD, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION

Mr. Chairman and members of the committee, my name is Caleb Shields. I am a member of the Tribal Executive Board of the Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana.

I am pleased to have the opportunity to testify concerning proposed amendments to Title II of the Indian Land Consolidation Act, enacted during the last Congress. A year ago, this Committee held a hearing on possible amendments to the Act. At that hearing, our tribal chairman, Norman Hollow, called for repeal of Title II of the Act and recommended field hearings so that tribal views could be fully explored. Chairman Hollow also recommended several important changes to the Act.

The Tribes have received a copy of a memorandum prepared by the Committee staff. The memorandum discusses the background of the Act and the amendments that have been proposed by tribal representatives, including Chairman Hollow and our tribal attorney, Marvin Sonosky. If the Committee adopts the views expressed in the report, it will amend the Act rather than repeal it. I urge the Committee to consider repeal. After all, a law that so drastically affects Indian rights should not have been passed in the first place without extensive field hearings. Title II was passed without even holding hearings on the Senate side. However, if the Committee decides against repeal, I should like to make some additional comments on needed amendments in light of the Committee staff's memorandum.

1. Sale of tribal land.—Title II would permit tribes to sell "any tribal lands or interests in land." My Tribes do not want this power. We do not want it, and we do not need it. Tribes never gain by trading their capital assets for money. As Chairman Hollow testified, there are powerful interests that would welcome the opportunity to separate the Tribes from their valuable land and minerals. Congress should not support a law that exposes Tribes to pressure to sell their land.

According to the staff report, the Tribes need not worry—all the Tribes need do is not adopt a land consolidation plan and then the occasion for selling tribal land will not arise. We disagree. The same people who want to get their hands on tribal land and oil and gas would bring pressure to bear to adopt a consolidation plan giving broad authority for land sales. In fact, such a plan could be a very convenient device for wheeler-dealers to engineer quick sales of land, supposedly to get rid of fractional interests, or in aid of consolidation. The real reason would be to get title of tribal land. Also, Secretarial approval does not mean too much. Our experience over the years does not give us much confidence. After all, the decision on the local level is left to individuals who have little expertise and who are frequently subject to the same pressure as the Tribes are.

We are also concerned that the Act permits tribes to sell mineral rights. According to the report, such sales would not be approved if they were not "in the best interests of the tribe". Furthermore, the staff believes that tribes will be protected because the Secretary must take the minerals into account in determining fair market value. I would like one example of a sale of undeveloped oil and gas interests that was in the best interest of a tribe. The sale of minerals can never be in a tribe's best interest. Minerals, especially undeveloped oil and gas, cannot be fairly appraised and therefore the tribe cannot possibly receive fair market value. For the same reason, the requirement of Title II that the Secretary take the value of the minerals into account does not protect tribes.

We agree that if we own a tract of land that is isolated and is therefore of little economic benefit to the Tribes, we should have the power to dispose of the surface rights. As Chairman Hollow testified, the power to sell tribal land should be limited to such isolated tracts, minus the mineral interests.

2. Purchase of heirship interests.—The Act allows tribes to purchase fractional interests under certain conditions. Chairman Hollow suggested amendments that would make the tribes' purchasing power even greater. The report considers his suggestions thoroughly, and appears favorable to some of them.

I would like to make one further point about tribes' purchase of fractional interests. As long as it is done fairly, this is the best way to eliminate these interests and increase the tribal land base. The problem lies in finding the money. In my opinion, since Title II essentially was adopted for the Government's benefit, the Government should provide funds to tribes for the purchase of fractional interests.

3. Escheat of small fractional interests.—Under Title II, small fractional interests that have produced little or no income within the past year must automatically escheat to the tribe when the owner dies. To take land away from living heirs is pretty strong medicine. My Tribes strongly oppose this provision. If the United States wants to get rid of fractional interests it should do so in a straight way. The

Government should buy those interests and give them to the Tribes. Congress should not order them taken away and make it look as if the Tribes are trying to increase the tribal land base at the expense of their poorest citizens. This escheat provision should be eliminated, and the people it would affect should have the opportunity to sell their land to the Tribes—minus the minerals—just like everyone else.

4. Definition of "Indian".—The Act defines an Indian as "any person who is recognized as an Indian by the Secretary of the Interior." This definition is very important because the Act empowers tribes to adopt ordinances under which Indians so recognized by the Secretary can inherit trust land.

We object to the Act's definition because it does not provide any guidance to the Secretary in determining who is an Indian. Indians will have no way of knowing whether the Secretary will recognize their nonmember spouses and children as Indians. Therefore, tribal members will seek fee patents in order to be sure that the land will pass to their nonmember heirs. Over the years at Fort Peck we have already seen too much land pass out of trust, and we don't need a law that will just contribute to the problem.

In his testimony before this Committee last year, Mr. Sonosky suggested specific standards to guide the Secretary in determining who is an Indian. We support these standards. They include recognition as an Indian by the governing body of the tribe, as well as recognition by the community at large, which are two of the most important factors. Adoption of these standards will ensure that the right to inherit extends to all Indians, regardless of tribal membership, and in so doing will help to preserve the trust land base.

Once again, I urge the Committee to repeal Title II of the Act. At a minimum, the specific amendments that the Committee decides upon after this hearing should be presented to the tribes for comment.

Senator ANDREWS. Mr. Shields, counsel points out to me that we have to correct the record. The prior hearing record does not indicate that 44 percent of the allotted land will escheat to individuals. It indicates that 44 percent of the persons listed as having an interest, have an interest of less than 2 percent. This may just have been a misunderstanding that we had, and the reporter might have picked it up that way, too, but I know you want to make an accurate record. Is that not in essence the fact?

Counsel, do you understand what we are doing to correct the record?

Mr. SHIELDS. That was just my interpretation of that memorandum that was generated by the committee.

Senator ANDREWS. Might I ask counsel, so that we have an accurate record—not comparing apples with oranges—is it your understanding counselor that it is not 44 percent of the allotted land; it is 2 percent of the allotted land and 44 percent of the persons listed?

Mr. SONOSKY. That is my understanding.

Senator ANDREWS. Counsel, do you have anything to add?

Mr. SONOSKY. I heard something this morning, when Senator Gorton was presiding, that I thought might be of interest. Senator Gorton discussed with the Deputy Assistant Secretary of the Interior the matter of appraisals. One of our concerns regards the appraisal of minerals. Both of these reservations, the Wind River Reservation and the Fort Peck Reservation, are oil and gas producing reservations. All of the land within those reservations is within oil and gas country, all of it has potential oil and gas value, and a substantial portion of it is under development. When it comes to appraising minerals, particularly oil and gas, it cannot be done. The testimony of the witnesses from Wind River substantiates what the practice is. If an Indian wants to sell his undeveloped oil and gas on the reservation, where he may not own the surface but only the

mineral interest, the Bureau of Indian Affairs will not permit it. The reason the Bureau will not permit such sales is that there is no way of determining the value, and the Bureau has the obligation to get the fair market value for the oil and gas. That is the Bureau's policy and that is its practice.

I cannot help but feel that the act that we have before us should eliminate minerals because minerals cannot be validly appraised. Also, the provision making income the test of eligibility for escheat should be eliminated. A tract of land may be highly valuable for minerals, or may be highly valuable for timber and still not have produced any income.

Income should not be the test of eligibility for escheat. If income is to remain a test, the law should be modified to require the Secretary to certify that the particular tract of land had no value for minerals, or was not believed to contain minerals; that the tract of land had no potential value for timber; or that a tract of land is not so located that it is potentially valuable for commercial or residential purposes, as witness a tract near an urban center.

If the Secretary so certified, then the tracts could be appraised as if they had no such value.

Senator ANDREWS. I am sure that when the committee goes into markup, such an amendment will be studied very closely. We appreciate your detailing it.

Mr. SONOSKY. And I leave the rest of it to my statement.

Senator ANDREWS. You have been most helpful.

Mr. SHIELDS. Mr. Chairman, could the record be left open for a submitted statement from the Montana Intertribal Policy Board? [4]

Senator ANDREWS. We will be most happy to leave the record open. The record is traditionally left open in this committee for a period of 1 week to 10 days after the conclusion of hearings to accommodate those members of tribes, members of tribal councils, and others who have a long distance to come and it takes a little extra time to receive their statements. We want these hearings to be as complete as possible, so we would be very glad to accommodate that request.

Our next group consists of Mr. Joe Smith, chairman of the Northern Arapahoe Tribe. He is accompanied by Tom Fredericks from Boulder, CO; Mr. Dan Press, representing the Blackfeet Tribe; and Mr. Donald Stewart, who is the chairman of the Crow Indian Tribe.

Mr. Smith, do you want to go first?

Let me assure you that if you have a prepared statement, it will appear in its entirety in the record, and you can summarize it in any way you wish. It will allow others who have yet to testify the opportunity to be heard without taking too much time.

[4] Not received for printing.

STATEMENT OF JOE SMITH, CHAIRMAN, NORTHERN ARAPAHOE TRIBE, WIND RIVER RESERVATION, WY, ACCOMPANIED BY DENNIS SAN RHODES, MEMBER, NORTHERN ARAPAHOE BUSINESS COUNCIL, WIND RIVER RESERVATION, WY; AND THOMAS FREDERICKS, ATTORNEY AT LAW, FREDERICKS & PELCYGER, BOULDER, CO

Mr. SMITH. Thank you, Mr. Chairman and members of the committee. We did submit our testimony, and we were here last year in July 1983 before this committee and submitted testimony at that time.

I have with me another member of the Arapahoe Tribe Business Council, Dennis San Rhodes, and we also have with us our tribal attorney, Thomas Fredericks, from Boulder, CO.

The only concern we have is that we think fractionated interests being escheated to the tribes should be compensated. I think we have that in our testimony. They should be compensated for land that is going to be escheated to the tribes.

We also support providing safeguards when tribal members match a tribe's purchase offer and then turn around and sell the land to a non-Indian. In the absence of such a provision, a tribal member could act as a straw man in such a real estate transaction for a non-Indian and thereby defeat the intent of the act. I think this was submitted by the Shoshone Business Council, and we feel the same way.

Turning to the most controversial section of the act, section 207, which provides for an automatic escheat to the tribes of members' interest in land where there is 2 percent or less, where land has failed to earn $100 a year. We feel that section needs to be amended. We believe that it is important for those members whose lands are subject to escheat to be fairly compensated for the loss of their land. I did present that earlier, and we have on the reservation 60 percent of the individuals who have interests in individually held trust land having an interest of 2 percent or less.

The Indian Land Consolidation Act does have the potential for affecting the interest of a significant number of tribal members. Compensation for those individuals' interests could be handled by having those members whose interest is not subject to escheat in a parcel of land having first right to purchase that interest which is subject to escheat. If they fail to exercise this opportunity within a reasonable time, the land will then escheat to the tribe.

We also feel that the $100 income requirement in section 207 needs to be changed. The structure of this requirement does not, in most instances, accurately reflect the true value of the land. At a minimum, an appraisal of the property should be conducted so as to determine its true value.

In summary, we would continue to support the general intent of this act facilitating tribal consolidation of its land base, but we firmly believe that the individuals' interest should not be sacrificed without reasonable compensation. After all, it was the allotment acts in the United States which brought the situation of fractionated interests now faced by the Bureau of Indian Affairs today. We support the vesting of title in trust to the tribe, but only with compensation to individuals from the United States for the loss of their

property. As we pointed out in the hearings held in July 1983, long-term administrative costs to the Government of administering these records could be eliminated by short-term financial investment clearing up the problem.

Mr. Chairman, that concludes my statement, and we may have some comments from my other counsel, Mr. Dennis San Rhodes, if he has anything to say at this time.

Mr. SAN RHODES. No.

Mr. SMITH. Mr. Fredericks?

Mr. FREDERICKS. No.

Mr. SMITH. That concludes our testimony, Mr. Chairman. We did submit this testimony, and we thank you for allowing us to present our testimony at this time.

Senator ANDREWS. We appreciate your participating.

[The prepared statement follows:]

PREPARED STATEMENT OF JOSEPH SMITH, SR., CHAIRMAN, ARAPAHOE BUSINESS COUNCIL, NORTHERN ARAPAHOE TRIBE

Mr. Chairman and members of the committee, I am here on behalf of the Northern Arapahoe Tribe of the Wind River Reservation, Wyoming. My name is Joseph Smith, Sr. I am Chairman of the Arapahoe Business Council, the governing body for the Arapahoe Tribe.

As you know, the Arapahoe Tribe presented testimony at the hearing held in July 1983 before this Committee on H.J. Res. 158. I am here today to offer additional testimony on this bill.

The Arapahoe Tribe continues to support one of the purposes of the Indian Land Consolidation Act (codified at 25 U.S.C. § 2201) of preserving the tribal land base. We are therefore in favor of maintaining Section 203 of the existing act which authorizes the Tribe to have lands placed in trust for the Tribe under Section 5 of the Act of June 18, 1934 (48 Stat. 985). The Arapahoe Tribe elected not to come under the Indian Reorganization Act when it was originally passed. With the application of the provisions of Section 5 of the 1934 Act, the Tribe has been able to have lands placed in trust that it would otherwise not have been able to have. This has helped the Tribe move toward the goal of preserving its land base, one of the principal purposes of the Indian Land Consolidation Act. Preservation of our land is exceedingly important culturally and governmentally for the Northern Arapahoe Tribe.

We also feel it is important that Section 204 of the Act remain with those provisions giving broad authority for the Tribe to dispose of surface or mineral lands in accordance with an approved land consolidation plan. The provisions as they now exist in the Section 204 afford to the Tribe the kind of flexibility it may need in the future with respect to unique land transactions. We do not support any amendments which would further restrict the Tribe in this area.

With respect to Section 205 which provides for acquisition by the Tribe of fractionated interests we support amending the act so as to allow the Tribe to acquire by consent less than the entire 100 percent interest in a fractionated parcel of land. We feel this is necessary given the fact that over a period of time the Tribe will acquire by escheat minor interests in parcels of land and then because of financial considerations, only have the ability to purchase a percentage of a parcel at a time.

The Tribe also supports amending this Section to provide safeguards against having a tribal member match the Tribe's purchase offer and then turn around and sell the land to a non-Indian. In the absence of such a proviso, a tribal member could act as a straw man in such a real estate transaction for non-Indians and thereby defeat the intent of the Act.

Turning now to the most controversial section of the Act, Section 207, which provides for an automatic escheat to the Tribe of a member's interest in land where it is 2 percent or less and where the land has failed to earn $100.00 in the year prior to escheat, we feel this section needs to be amended. We believe that it is important for those members whose lands are subject to escheat be fairly compensated for the loss of their lands. On the Wind River Reservation 67 percent of those individuals who have an interest in individually held trust lands have an interest which is 2 percent or less. The Indian Land Consolidation Act as a consequence does have the potential for affecting the interests of a significant number of tribal members. The Compensation for these individuals' interest could be handled by having those mem-

bers whose interest is not subject to escheat in the parcel of land have the first right to purchase that interest which is subject to escheat. If they failed to exercise this opportunity within a reasonable period of time, the land would then escheat to the Tribe.

We also feel that the $100 income requirement in Section 207 needs to be changed. The structure of this requirement does not, in most instances, accurately reflect the true value of the land. At a minimum, an appraisal of the property should be conducted so as to determine its true value.

In summary, we continue to support the general intent of this Act of facilitating tribal consolidation of its land base, but we firmly believe that the individual's interest should not be sacrificed in this cause without reasonable compensation. After all, it was the Allotment Acts of the United States which brought about the situation of fractionated interests now faced by the Bureau of Indian Affairs today. We support the revesting of title in the Tribe but only with compensation to the individuals from the United States for the loss of their property. As was pointed out in the hearings held in July of 1983, the long-term administrative costs to the government of administering these records would be eliminated by a short-term financial investment of clearing up the problem.

STATEMENT OF DANIEL PRESS, ATTORNEY AT LAW, WASHINGTON, DC, ON BEHALF OF THE BLACKFEET TRIBE, BROWNING, MT

Mr. PRESS. Mr. Chairman, I am here representing Earl Old Person, chairman, the Blackfeet Tribe. Mr. Old Person wished to be here today. He got tied up at the last minute. Not only did he not get here but his written testimony did not get here. As soon as it arrives, we will submit it for the record, with the permission of the committee, but I would like to express Mr. Old Person's concerns about this legislation.

I think we share the concerns expressed by other tribes that the provision 207, the escheat provision, has two problems. One, we believe it is unfair. The tribal council has been subjected to enormous criticism by its members for what they believe is the tribe cheating them out of their land. The tribe agrees with that; they believe that the provision is just unfair.

Second, the provision does not accomplish the purpose that I think both committee and the tribe wish to achieve, which is to have the land in manageable economic units so that they can be used to promote economic development on the reservation, be it ranching or farming or even effective leasing where the owners are in a position to bargain. Even if the tribe gets these small parcels, it is going to be years and years before the tribe has anything more than hundreds of isolated little parcels that are going to be units that the tribe can effectively use or lease. So, in addition to its being unfair, we believe that it is not an effective technique.

We would like to recommend three possible approaches for the committee to consider as an alternative to 207. One is that the Congress set up a low-interest long-term loan fund, which is tied to the amount of money that the tribe will get in the form of income from the land, so that the tribe will not have to reach into its very limited treasury to pay for land. This would not be limited only to escheat land. There are many people on the reservation who want to sell their undivided interest to the tribe. The tribe would like to buy them and consolidate the land. They just do not have funding, and there is no adequate loan program around. So we think that rather than just focusing on a small area of 2 percent or less, there

ought to be a loan program that allows tribes to develop a more comprehensive attack on the fractionated problem.

Second, we propose that 207 be postponed for a 7-year period. During that period, tribes should be given an opportunity and the resources to develop their own consolidation plans, plans that meet their own particular tribal needs. We believe this approach would be consistent with self-determination. Rather than trying to use the stick to achieve land consolidation, use a carrot. What we are proposing is that the BIA be given a grant authorization and appropriation, where a tribe can submit a plan under which it would propose an approach for consolidating land problems—again, not just the escheat problems but for all land consolidation problems and receive funding.

When the Land Consolidation Act was first enacted, the Blackfeet Council sat down and said, "We need to do something." We came up with two approaches. One was to take all of the fractionated interests, put them on a computer, and see if we can develop land exchanges from the tribe member to member that would enable people to consolidate their interest and have valid, viable tracts of land. The second idea was to set up family corporations, where the land would be held by a single entity and the corporation would be responsibiie for making payments equivalent to stock dividends to the individual tribal members.

We submitted a proposal to the Bureau of Indian Affiars for funding to purchase the computer software to do this work and to provide the legal and technical assistance. But, the Bureau said: "We have no money to do it." The tribe does not have money to do it. So, effectively, the idea of promoting tribal self-determination that is inherent in the original act does not make sense without the money to back it up.

In conclusion, we believe that the problem is a serious problem, but Congress tried to attack the problem without having to put any money up. We believe it is too serious a problem and too ingrained a problem for Congress to believe it can get away solving it at no cost or by imposing the cost on the backs of the tribes and the Indian people. As one of the witnesses just indicated, the problem was originally Congress' problem because of the Allotment Act, and we believe that the U.S. Government should bear a proportionate share of the costs that are going to be incurred in solving the problem. If the Congress is willing to do that, we believe the tribes are willing to meet them more than halfway to develop viable proposals to use their self-determination to solve the problem. We think you will get more creative solutions fairer solutions, and quicker solutions than now proposed under 207.

[The prepared statement of Earl Old Person follows:]

PREPARED STATEMENT OF EARL OLD PERSON, CHAIRMAN, THE BLACKFEET TRIBE

The Blackfeet Tribe respectfully submits this testimony on proposed amendments to the Indian Land Consolidation Act. Section 207 of that Act, the escheat provision, has caused great anguish among our tribal members, particularly our honored older members, and we appreciate this opportunity to suggest changes in this provision.

The Tribe believes that the escheat provision is both unfair and ineffective and must be repealed. However, it also recognizes that strong action is needed to address the serious fractional land problem that exists on Blackfeet and other reservations. Therefore, our testimony suggests several new approaches that we believe would be

more effective and fairer than the escheat provision. The approaches are based on the guiding principle of self-determination that this Committee has so actively championed. But in addition, they require some expenditures by the Federal government. Given that the Federal government is largely responsible for the existing problem, we believe it must share the costs incurred in correcting it, rather than making the costs fall solely on the backs of individual Indians and tribes, as is the case under the present legislation.

I. THE PRESENT LEGISLATION IS UNFAIR AND INEFFECTIVE

The escheat provision has created more anguish among our members than any other piece of federal legislation in recent memory. Our older members do not consider even the small interests in land to be so insignificant that they can just be taken from them. They consider such interests as part of the invaluable heritage they are to pass on to the next generation. They see the escheat provision as doing nothing less than cheating them out of their property. We believe they are right. We are aware of no comparable situation in this country's entire history—where individuals have had land just taken from them without compensation. The old people ask the Tribe to refuse to take the escheated interests, but the Tribe is legally required to take them. They then ask that the Tribe purchase the interests. The Tribe would like to but lacks the funds with which to do so. Thus, the present provision also has created tensions between tribes and their members.

But in addition to being unfair, the provision will not accomplish the objectives both the Congress and the Tribe are seeking. Our primary goal is to restore the land ownership situation to a point where land interests are in viable economic units so they can be used to their maximum potential to promote the reservation economy. Under the escheat provision, it will take many many years before the tiny interests the Tribe obtains will meld into viable economic units. Nor will the provision produce much in the way of immediate bookkeeping savings for the BIA. Rather, the escheat provision is simply a token effort that pretends to address a very small part of the fractional interest problem.

II. PROPOSED ALTERNATIVES

The Blackfeet Tribe believes there are more effective and equitable methods for dealing with the fractional land problem, based on the principles of tribal self-determination. Specifically, the Tribe requests that the effective date of the escheat provision be stayed for a seven-year period. During that time, each tribe would be given the opportunity to develop its own approach to the fractional land problem. At the end of the seven-year period, the escheat provision would go into effect only on those reservations that had not developed and implemented a plan acceptable to the BIA.

The Tribe believes there are many steps a tribe can take to address the problem. For example, Blackfeet is exploring computerizing all of the fractional interests and then arranging land exchanges among individuals in order to consolidate their various interests. Since many members hold large numbers of different small interests, this consolidation approach could lead to a significant reduction in the fractional holdings. Another approach is to encourage families to set up family corporations and place all of their land interests in the corporation. This would create a single legal entity with the authority to use the land, thereby increasing its economic potential as well as reducing the BIA's paperwork burdens.

However, for this approach to work, Congress must provide administrative funding to tribal land offices to enable them to develop and implement their plans. After Blackfeet came up with the above mentioned approaches for dealing with the fractional problem, it submitted a proposal to the BIA for funding to buy the computer software, to enter the information and to carry out all of the other work involved in putting those ideas into action. We were told by the BIA that it had no money available for such purposes. Without the funding, the Tribe was unable to proceed with these innovative ideas. We therefore request that the legislation provide for a grant program under which the BIA will be authorized to provide funding to a tribal land office to develop and implement a consolidation plan once a tribe has submitted an acceptable proposal. It is our recommendation that there be authorized $5 million a year for this grant program, with carryover authority.

The proposed approach is consistent with the principles of self-determination. It is also consistent with Congress' increased emphasis on federal-local government partnerships, (e.g., the air bag safety issue,) where states or other local jurisdictions are given the first opportunity to address a problem, and the Federal government gets involved only after a state has failed to do so in a reasonable period of time. This

approach should also produce many innovative and creative approaches as individual tribes focus their energies on this problem. Finally, the small amount of funds expended under the grant program will reap large savings to the BIA in real reductions in recordkeeping and other costs, as well as to enable tribes to better use their land base for economic development.

The second part of our recommended alternative is for a funding program to enable tribes and individuals to purchase fractional interests. Even the most innovative approaches of the kind discussed above which do not require land purchases will not be sufficient to solve the problem.

The Tribe believes that simply providing some funds to compensate individuals for the land escheated is not the solution. That would be tokenism that might relieve the anguish but will not contribute substantially to a solution to the overall fractional land problem. Instead, the Tribe recommends the establishment of a low-interest, long-term loan fund that tribes can use to purchase all fractional interests, not just those in danger of escheating. Specifically, the loan program should be structured so there is a relationship between the annual amount the tribe must repay on the loan and the amount of income the tribe will receive from the land it is purchasing. For example, if the annual income from the purchased land were $800, the annual loan repayment could be set at 120% of that figure, or $1000. This would mean the tribe would have to pay about 20% of the repayment out of the tribal treasury. This would ensure tribal commitment. However, the bulk of the repayment, $800, would be able to come from the income off of the land, so a land consolidation purchase program would not drain the tribal treasury.

In sum, the Tribe believes that a joint federal-tribal effort can creatively and expeditiously solve the fractional land problem in a manner that the escheat provision never could. The Tribe stands ready to work with the Committee to further develop the ideas set out in this testimony. Finally, the Tribe deeply appreciates the time and effort the Committee has devoted to this issue and its sensitivity to the concerns that have been expressed by our people.

Senator ANDREWS. Thank you very much.

Mr. Fredericks, I understand you have a statement by Don Stewart?

Mr. FREDERICKS. Yes, Mr. Chairman.

Senator ANDREWS. It will be included in the record at this point.

[The prepared statement of Donald Stewart, Sr. follows:]

PREPARED STATEMENT OF DONALD STEWART, SR., CHAIRMAN, CROW TRIBE

Mr. Chairman and members of the committee, my name is Donald Stewart, Sr. I am the Chairman of the Crow Tribe. Although we did not have the opportunity to present our views on H.J. Res. 158 at the hearings in July of 1983, we are pleased to be here today to give our comments.

The Crow reservation encompasses approximately 2,282,764 acres of which about 66 percent is tribally or in allotted or inherited Indian-owned status. Of the individuals who have an interest in allotted land, 55 percent have an interest which is 2 percent or less. Therefore, under Section 207 of the Indian Land Consolidation Act a significant number of individuals will thereby be affected by the escheat provisions of the Act.

Although the Crow Tribe endorses the purpose of consolidating the tribal land base through purchase and exchange, it also does not want this accomplished at the expense of its individual members. Land consolidation is consistent with the Tribe's policy; for some time now the Crow Tribe has had an active tribal land repurchase program. Under this program the Tribe has the first right to purchase allotted lands which are offered for sale. Thus, the Crow Tribe is committed to re-acquiring lands within the Reservation and sees the Indian Land Consolidation Act in a positive light. For example, those provisions of the Act which allow the Tribe to take lands in trust are therefore viewed as very helpful to the Tribe in re-acquiring its lands, however, the Tribe has always felt that its members should be fairly compensated for their lands. Therefore, since it is the position of the Bureau of Indain Affairs that in the interest of administrative efficiency, individual interests in land automatically escheat to the Tribe under Section 207 of the Act, the Crow Tribe strongly supports amending the Act to provide compensation to these individuals.

The Crow Tribe does not however have the financial resources to provide compensation to these individuals who are faced with the loss of their interest in lands under the Act. The existing tribal land purchase program cannot even begin to pur-

chase lands now being offered for sale to the Tribe by its members. Although over a period of time the Crow Tribe stands to benefit from the re-acquisition of land through escheat, the Bureau of Indian Affairs also benefits by eliminating all administrative costs of maintaining records on these fractionated interests. And since the fractionated interest issue is primarily a Bureau of Indian Affairs problem, the Tribe should not have to pay for the cure.

It is also our position that the $100 income standard in Section 207 in the year prior to escheat fails to give a fair approximation of value of the land. This needs to be revised so as to reflect the true value of the worth of the land.

With respect to Section 204 which permits the Tribe to make land exchanges and sales, the Tribe does not support amending the Act in any way which will cut back on this authority. The tribal government welcomes this responsibility and if the government is to further mature, it needs this latitude.

If the changes we have commented on are made, in our estimation the Act will be improved and the results obtained will be beneficial to all concerned.

Senator ANDREWS. Mr. Fredericks, do you have any comments of your own, with your background and experience in this field, that you would like to add briefly?

STATEMENT OF THOMAS FREDERICKS, ATTORNEY AT LAW, FREDERICKS & PELCYGER, BOULDER, CO, ON BEHALF OF THE NORTHERN ARAPAHO TRIBE, WIND RIVER RESERVATION, WY

Mr. FREDERICKS. Well, Mr. Chairman, initially I would like to commend this committee for its efforts in developing legislation to resolve this very serious problem. As I was listening to Mr. Sonosky, the Shoshone Tribe and the Fort Peck Tribe talking about the mineral interests, it occurred to me that the mineral interests are going to be just as big a problem to administer for the Bureau of Indian Affairs on mineralized reservations as the surface. It is my opinion that you are going to have to resolve the subsurface estate on these reservations right along with the surface.

I realize that the value is not easily ascertained, but it is going to be a problem as far as administration. For every lease, you will have to get the same consent in the subsurface area as you do on the surface area. So you are going to have the same administration nightmare with regard to subsurface mineral acres as you do to surface. That is one area that I feel the act has not really dealt with adequately. I know it is a necessary step to deal with the surface area problems, for they have been around a long time. But I, too, feel that the Bureau of Indian Affairs has known about the heirship problem for many, many years and has not taken the time to adequately address this problem. I, therefore, agree with the tribal people that the bureau or the Congress should appropriate the funds necessary to compensate the individuals who stand to lose land under the provisions of the statute.

If we were starting out at the time of the Allotment Act, we could say it is going to escheat. It would be on our back, and it would be our problems. But now we are in a hole. We have hundreds of thousands of fractionated heirships lands, and Congress is attempting to remedy a problem by requiring the individuals to give up small interests in land. It seems unfair to the individuals to have to give up this land. If they knew about it in the beginning, they could have taken steps themselves to try to correct it, or the tribes could have taken steps. But to come in and say, "Because you own 2 percent, and the value of your land is less than $100, we are going to allow your land to escheat" is very difficult for an in-

dividual to take because he feels that he is not getting due process, and he is not getting just compensation for his real property.

I think those are the problems that you are going to have with the escheat provision because you are attempting to correct a problem that is in existence. This is a major problem, and it is very difficult to administer at the bureau, but I feel that compensation of some kind is necessary, at least for all lands that presently fall within the escheat provision. From the effective date of the bill forward, we could have the escheat provision because you are starting from a clean slate.

You would not have the retroactive application problem. You have a long practice of this problem snowballing. It is getting worse, and it is getting unmanageable. But at the same time, these people need to be compensated as a matter of equity since the BIA has allowed this problem to get to its present state.

Senator ANDREWS. We appreciate those comments. Thank you very much for an excellent presentation.

Our next witness will be Willis Dixey, who is the tribal council member of the Shoshone-Bannock Business Council in Idaho, accompanied by Gerald Shay, and Allen Slickpoo, who is the secretary of the Nez Perce Tribal Executive Committee, also in Idaho, and he is accompanied by Kevin Gover.

Mr. Slickpoo, why don't you proceed. You have a prepared statement, and that will be included in its entirety in the record.

STATEMENT OF ALLEN SLICKPOO, SECRETARY, NEZ PERCE TRIBAL EXECUTIVE COMMITTEE, LAPWAI, ID, ACCOMPANIED BY KEVIN GOVER, ATTORNEY AT LAW, FRIED, FRANK, KAMPELMAN & SHRIVER, WASHINGTON, DC

Mr. SLICKPOO. I would like to summarize the testimony that I am presenting on behalf of the governing board of the Nez Perce Tribe, the Nez Perce Tribal Executive Committee, and the Nez Perce people in general.

The concern that we have on our reservation was well expressed in the last two general councils of our tribe relating to the Indian Land Consolidation Act. In May of 1983, a great majority of our tribe and including members of the tribal council were not aware of the fact or the enactment of Public Law 97-459. In learning this, we were also unaware that there was not any adequate time given to the tribe to have their input in making testimony as to the effect that this particular bill would have on our tribal lands.

Primarily I am focusing on the escheat provision which we are in objection to. The Nez Perce Tribe, like many other tribes in the country, in order to comply with the national policy of intent to reduce Indian land ownership were, first of all, forced upon reservations and, second, in doing so, the attempts to reduce Indian land ownership continued to cope with the aims to the genocidal policies of the 1800's.

Historically, by the Indian Claims Commission, we were recognized to have ownership to lands of 13.5 million acres prior to the treaty of 1855. Under the treaty of 1855, this was reduced to 7.5 million acres. Following that, due to gold strikes and encroachments within the confines of our reservation boundaries, what we

have termed as the "Steal Treaty," the treaty of 1863, was signed by just a few chiefs of our tribe. The 1863 treaty was made which constituted a total of 750,000 acres, as compared to 7.5 million under the treaty of 1855.

Consequently, in 1893, the Executive order by a stroke of the pen reduced the 1863 boundary to 10 percent. Between the 1863 treaty and the 1893 Executive order, we were forced into accepting the Allotment Act by which those lands which were not allotted within our 1863 treaty boundaries were, under pretense, classified "surplus lands" which consequently opened up our reservation to a landgrab policy, thus checkerboarding and reducing our Indian land ownership on the reservation.

Now, Public Law 97-459 proposes to go further, by taking the inherent right of individual Indians to own a part of his or her heritage and the identity to the land base. I feel, as a father of five children, that my children have the inherent right to own a piece of the land through their ancestry. Even 3½ acres to a 160-acre allotment stems pride to our young people in anticipation to owning a part of our remaining precious lands that we now own.

I own interests in approximately 400 acres on the Umatilla Reservation, in which 2 of those are badly fractionated, although I am one of the major owners of those particular allotments. Nevertheless, by the comparison of the land value, as compared to the Nez Perce Reservation and the Umatilla, the crop yields on these lands are identically the same, yielding 70 bushels per acre as compared to the Nez Perce Reservation. However, the Nez Perce Reservation land value has skyrocketed to anywhere from $50,000 to $100,000 for 80 acres of tillable land. On the other hand, on the Umatilla Reservation, the same amount of acreage of allotments, 80 acres, yields 70 bushels per acre by comparison to that on my reservation, the land value has been appraised by the Bureau of Indian Affairs to be at the average of $25,000, as compared to anywhere from $50,000 to $100,000 on the Nez Perce Reservation.

By heritage, I am half Nez Perce, and I am also a Cayuse, Umatilla Walla Walla member, although I am not enrolled on an Umatilla Reservation, through my mother's lineage and family ties. She was an enrolled Umatilla, and my father was an enrolled Nez Perce.

If there are any questions, we will respond at this time. Nevertheless, I still strongly feel that our children are entitled to inherit what we inherited, and I do not think that those property rights should be taken away from them, even by the tribe.

[The prepared statement follows:]

PREPARED STATEMENT OF ALLEN SLICKPOO, SECRETARY, NEZ PERCE TRIBAL EXECUTIVE COMMITTEE

Mr. Chairman, Members of the committee, my name is Allen Slickpoo. I am Secretary of the Nez Perce Tribal Executive Committee. I represent the Executive Committee as well as the General Council of the Nez Perce Tribe.

The problems arising from fractionated heirship and ownership of Indian land are of great concern to the Nez Perce Tribe. The Nez Perce Tribe was subjected to the allotment policy of the late Nineteenth Century, and continues to suffer the ill effects of that poorly-conceived policy. Many thousands of acres passed from Indian ownership, leaving an inadequate tribal land base and an inefficient pattern of individual ownership of fractionated interests in allotted lands.

We were pleased that Congress finally addressed the problem of fractionated heirships in adopting the Indian Land Consolidation Act. We believe, however, that the Act is inadequate in terms of the primary problem of insufficient tribal land bases. We also believe that the escheat provision is a most inappropriate means of addressing the problem of fractionated heirship. I would like to focus my testimony on these two points.

Certainly most Indian people would agree that consolidation of tribal land holdings is a worthy goal. However, the expansion of tribal land holdings is an even more worthy goal. The Indian Land Consolidation Act addresses the problem of consolidation but utterly fails to come to terms with the greater problem of inadeqate tribal land bases. Consolidating land holdings when those holdings are inadequate to meet tribal needs does little

The Land Consolidation Act merely facilitates the transfer of land from the ownership of individual Indians to the tribes, and the transfer of tribal lands in exchange for other lands. Neither type of transaction in any way addresses the fundamental problem of the inadequacy of Indian land holdings. The Indian Land Consolidation Act reflects the priorities of the Bureau of Indian Affairs rather than those of Indian tribes in that it seems primarily aimed at reducing the administrative burden of the Bureau rather than expanding Indian land holdings. Moreover, I believe that it is unlikely that the Bureau will show any real budget savings, particularly in view of its capacity for creating enormous administrative costs for everything it does. If any such savings are realized, they should be devoted to solving the true problem of Indian land ownership: the inadequacy of Indian land bases.

Turning next to the escheat provision, the Nez Perce Tribe absolutely opposes the escheat provision of the Act. We did not ask for this provision and we do not want it. Many members of the Tribe believe that the provision is a high-handed and unwarranted interference with their property rights. As a historical legal matter, escheat is not applied where the owners of property and their whereabouts are known. Although the property interests at issue are quite small, they nonetheless represent property which should not be taken without just compensation.

Aside from this fundamental objection to the escheat provision, we object on several other grounds as well. First, the provision requires escheat where an individual's interest is less than 2% of the whole and yielded less than $100 in the previous year. This measurement of the "insignificance" of a particular interest is imprecise and ignores a number of factors indicating that such interests are not insignificant. For example, 2% of 160 acres is 3.2 acres, more than enough for a homestead. The $100 figure fails to take into account the economic potential of the land. Some parcels may yield only a small income in a given year or years, yet have great economic potential. Land with undiscovered underlying mineral resources is the most obvious example of such a situation.

The escheat provision also fails to consider the value which the owners of fractionated interests may attach to their interest. Many tribal members cannot afford to go out and purchase land, and their interest in an allotment may be the only interest in land they will ever have. This interest represents more to them than the meager checks they may receive from the Bureau. It represents their share of the tribal domain, albeit a small, fractionated share. The psychological importance of even this small degree of ownership should not be underestimated.

Finally, I note that the escheat provision is the only provision of the Act as to which a tribe has no choice but to participate. All of the other provisions, most of which the Nez Perce Tribe believes to be useful reforms, involve voluntary acts of the tribe before the provisions have effect on any particular reservation. The escheat provision, however, applies whether or not a tribe wishes it.

None of this is to say that the problem of tiny and uneconomical fractionated interests should not be addressed. The solution to this problem, however, is not to strip individual Indians of their property. We suggest that three principles should guide any effort to deal with this problem.

First, efforts should be made to find means by which fractionated interests may be made economical and usable ownership interests. For example, if tribes were authorized to enact ordinances providing for partition of allotments, the owners of fractionated interest might be able to have actual parcels of land available for their use rather than pieces of paper representing interests in land which cannot be used by them. Another possibility is to develop streamlined procedures by which dominant owners may buy out smaller owners by mutual consent.

The second principle is that under no circumstances should an Indian be deprived of his or her property without compensation. Perhaps the cost savings which BIA claims will flow from eliminating fractionated interests could be used to pay for such interests. I note also that the land acquisition loan fund authorized by the

Indian Reorganization Act never has been funded. Indeed, BIA has not even requested such funds in many years. The loan fund would be an excellent source of monies which could be used by tribes to buy out the owners of tiny fractionated interests.

The third and final guiding principle is that no provision for the elimination of fractionated interests should be applied to a tribe without the tribe's consent. Given the choice, the Nez Perce Tribe would reject the escheat provision. We do realize, however, that other tribes may find the provision to be useful and consistent with their tribal values. We believe, therefore, that each tribe should have the option of accepting or rejecting any law intended to address fractionated interests.

I would be happy to try to answer any questions you might have.

Senator ANDREWS. Thank you very much.

I see that Willis Dixey is now here. Mr. Dixey, do you have a statement prepared?

STATEMENT OF WILLIS DIXEY AND GERALD SHAY, MEMBERS, SHOSHONE-BANNOCK BUSINESS COUNCIL, FORT HALL, ID

Mr. DIXEY. Senator, my colleague councilman and myself came all the way down here and got caught up in the Washington weather last night. We did not get here on time. I do not think there is too much for us to say because I think all the Indian tribes are saying just about the same thing we are.

Senator ANDREWS. They certainly are. It will be noted that on behalf of your tribe, you share their concern over this issue.

Mr. DIXEY. That is right, Senator. A few months ago, I fell into the same trap, where 46 of us owned a 160-acre tract of land. It is all inherited farm land. A young person passed away, where 2 percent of this land went into tribal ownership. When it goes into tribal ownership, the individuals that own tracts of land along with the tribe cannot do a thing with that land but just lease it. I wanted to take mine out of that and work it myself and I could not do that, so the only thing that was left for me to do was sell that land, which I did. I sold the land to the tribe, and I turned around and went out and started buying land from individual tribal members that wanted to sell land.

I think that right now in the tribe, we have a stack of land sales about a foot high, where people want to sell their land before they die. I think they do not want this 2-percent deal or anything like that. It is a bad deal. I think if they are going to impose something like that on the American Indians, I think they should impose something like that on the other people that are not Indians. I think that us Indians who have been fighting for land for the last 200 years are still being penalized by Government regulations. I think the tribe as a whole should be the ones to determine what they want to do with their lands.

We will have to work it out with Congress, I know. If we wanted to sell tribal lands or whatever, we would have to work something out with them. Right now, we give up homesite plots, and we have many landless Indians on our reservation who are enrolled members of our tribe. Many of the young people who are coming back to the reservations from the urban areas, because they cannot make it out there any more, we have to break a piece of tribal land off and give them a homesite of 1¼ acres so that another department of the Government can come in and build them a home. This is what we have been doing recently, and it is working out pretty

good because we are getting our people back on the reservation, but it is not doing too good in other departments of the Government, like with the health benefits and things like that. They are not taking care of our people, but that is a different issue, and I do not think you want to hear it.

I could sit here all day and talk about it, but the land issue is one of the biggest. I think that our tribe, the Shoshone-Bannock, at one time, over 100 years ago, were two tribes, and we fought for land—as we all read in the history books, because I have to read along with you people to find out what happened back then. But our people come from different parts of the State, as the Nez Perce, our brothers here. We got along fine, and I think we got along fine with the settlers as long as we stayed in our own territories. I think that is the way our treaties read today: as long as peace prevails amongst the whites and the Indians, this treaty shall ever be. I think that is the way it is, and that is the way we want it.

This is the way we are working. We have a small reservation. Pretty soon it is going to look like Washington, DC, out there. I hope not, but it's getting that way. As long as we keep the rivers clean, and we can pull fish out of them, like we can down here in the Potomac, if they have fish down there. I know the Nez Perce here got a lot of fish over there.

Senator ANDREWS. It is getting a little better.

Mr. DIXEY. These are some of the problems that we are working on. We have just started in our own State—the Nez Perce and the Shoshone-Bannock—started working on a joint partnership with the State of Idaho, between the two tribes, which has never been done before. We come from the same areas. The sheep eaters, the band that I come out of, come out of the mountains in northern Idaho and some of the western parts of Idaho. We are now living on Bannock land, so we feel like invaders in their territory right now, but we are making a home, and it is going to be the last home that we have to make.

I would like to keep on talking, but I think there are other people that would like to say something. This bill, this land act, I do not think it is going to be very good for Indian people. I think it really splits us up. I know several Indian people on our reservation have already given up 2 percent of their land to the tribe, and as tribal leaders it does not look very good for us. I would rather sit and buy that whole parcel from the individuals than to steal 2 percent from them. That is the way it feels to us.

Like I say, we have a stack of applications now of people who want to sell their land. We are the only tribe in southeastern Idaho that has 96 percent of our original reservation intact. We are buying up more land that went out of trust in 1915, and we are trying to bring that land back into trust so we can keep our land there, whether it is a reservation or not, for our future generations of Indian people.

Thank you.

Senator ANDREWS. Thank you very much. Your people can be proud of you. You have made an excellent statement.

Mr. SLICKPOO. Senator, for the record, I would like to introduce our legal counsel here, Mr. Kevin Gover, from the law firm of Fried, Frank, Kampelman & Shriver.

Senator ANDREWS. Yes, Mr. Gover. It is good to have you here. Your client made an excellent presentation.

Our next witness is Carol Barbero, representing the Oglala Sioux Indian Tribe of Pine Ridge.

Your prepared statement is in the record in its entirety.

STATEMENT OF CAROL BARBERO, ATTORNEY AT LAW, HOBBS, STRAUS, DEAN & WILDER, WASHINGTON, DC, ON BEHALF OF THE OGLALA SIOUX INDIAN TRIBE, PINE RIDGE, SD

Ms. BARBERO. Senator, my statement can be summarized very quickly. I think we have learned from all the testimony this morning that the cure, although well-intentioned, has indeed been worse than the illness, or at least it has been received in that respect at Pine Ridge and apparently a number of other Indian reservations. I refer to section 207, the escheat provision, the only section of the act on which the Oglala Sioux Tribe wishes to take a position at this point.

They have asked me to come and repeat their position that was strongly espoused last year by two of their tribal officials. The Pine Ridge Indians are vehemently opposed to this section of the act. They request either a repeal of it or an amendment to it that would allow a tribe by resolution to opt out of this provision's coverage. In the alternative, of course, one could expressly exempt a particular tribe or reservation from its provisions, and of course the Pine Ridge would support something like that if they were among those, but that may not be such an excellent legislative technique.

I would like to make a couple of basic comments, Mr. Chairman, with regard to the rigidity and arbitrary and unfair nature of this section 207. I was pleased listening here to the testimony this morning to hear a number of imaginative suggestions from the witnesses as to how this fractionalized interest problem can better be treated than in this extremely arbitrary manner.

Senator ANDREWS. We learn it by listening to witnesses. It is amazing how much you learn when you keep your mouth shut and your ears open.

Ms. BARBERO. It is unfortunate, sir, that the BIA people have already gone and are unable to join in this dialog.

Senator ANDREWS. The BIA people have not changed a lot in the 20 years I have been watching them. I suspect they were that stubborn before.

Ms. BARBERO. That, Mr. Chairman, is the only message I have to deliver for our clients this morning.

Senator ANDREWS. We appreciate very much your being here, and we appreciate your representation of the Oglala Sioux.

[The prepared statement follows:]

PREPARED STATEMENT OF CAROL L. BARBERO, ESQ. FOR THE OGLALA SIOUX TRIBE

Mr. Chairman and members of the committee, my name is Carol L. Barbero. I am an attorney with the Wasington, D.C. law firm of Hobbs, Straus, Dean & Wilder and appear today on behalf of our client, the Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota.

Last year two tribal officials personally expressed the Oglala Sioux Tribe's strong opposition to Section 207 of the Indian Land Consolidation Act. The Tribe remained steadfast in that position and has asked me to relay this message to you.

Section 207 transfers to tribal ownership 2% or smaller interests in land if, upon the death of the owner, the interest had generated income of less than $100 during the preceding year. The Act does not require payment of any compensation to the heirs of the decedent, and makes no provision for recognition of the wishes any owner may have expressed as to how he/she want his/her interest to be devised. Indeed, short of inter vivos transfers, owners of these small interests are virtually powerless to take any action prior to their deaths that would avoid application of this escheat provision.

Mr. Chairman, the Oglala Sioux recognize that the authors of Section 207 were trying to help tribes and the Bureau of Indian Affairs deal with the administrative problems posed by fractionalized interests in land and to help tribes solidify their land bases. Although this goal is laudable, the means chosen to accomplish it are totally objectionable to the Tribe. Through Section 207, Congress has told affected Indians that their property interests are without any value whatsoever, and that any wishes they may have as to ownership of their property after their deaths are of no consequence. This zero value has been assigned not because it is a true measure of the interest's actual value, but solely because it is "administratively convenient" to do so.

The Oglala Sioux Tribe is the supposed "beneficiary" of the land interests that escheat to it under Section 207, but the Tribe does not want what this law gives it. The Tribe has no desire to acquire property in the manner Congress has selected in Section 207, especially where no compensation has been paid to the heirs of the deceased owners. By conservative estimate, this objectionable result has already occurred in some 120 estates probated on the Pine Ridge Reservation in the 1½ years since this law went into effect.

The Oglala Sioux Tribe urgently requests that Congress take steps to repeal Section 207 which it believes is an unconstitutional taking in violation of the Fifth Amendment. In the alternative, the Tribe asks that the Pine Ridge Reservation be expressly exempted from the operation of this provision, or that the law be amended to permit a tribe, by resolution of its governing body, to opt out of Section 207 applicability.

If the Committee has questions, I will be happy to respond.

Senator ANDREWS. Before we adjourn, I have a statement from Virginia Beavert of the Yakima Indian Nation which I will introduce into the record.

[The statement follows:]

PREPARED STATEMENT OF VIRGINIA BEAVERT, EXECUTIVE GENERAL COUNCIL, YAKIMA INDIAN NATION

In reference to Section 207 of the Indian Land Consolidation Act

Since this law was implemented by the Government on the Yakima Reservation regarding escheatment of fractionated heirship, due process is not practiced. Principal heirs are not notified by the U.S. probate judge before the escheatment. The other landowners are not provided the opportunity to purchase that portion of the fractionated share.

In regard to Allotment 2325 on the Yakima Reservation

Temens Sawyalil was given this allotment. She had two daughters, each from different marriages. One had a Yakima father, Oscar Wanto, the other a Cowlitz, erroneously alloted and enrolled in the Yakima Reservation. When their mother died the daughters inherited their mother's allotment equally, one-half each.

The daughter from the Cowlitz father inherited one-half of her mother's share from the first husband's estate (Oscar Wanto's allotment) while her sister inherited three-fourths, the other inherited one-third from the mother.

The eldest daughter married a Yakima, the younger married a Nez Perce. The younger daughter had two children, one enrolled in Yakima, the other Nez Perce.

The Yakima daughter had two children from a common-law marriage and she enrolled them in Yakima. She then legally married a Colville and had two children enrolled in the Colville Reservation.

The Nez Perce brother died first. LaVerne Reynolds, and the sister Myrna Reynolds Atkins died a few weeks later. They both were young and died intestate.

The brother was not married and the only heirs would have been his nephews and nieces. But, no probate was instituted.

The sister's Colville spouse sold his children's share without the knowledge of the largest portion (¾) three fourths of the land in question—allotment 2325, Temens Sawyalil, and allotment of Oscar Wanto (father of Hoptonix Sawyalil).

Hoptonix Sawyalil would have purchased that share and consolidated it into productive agriculture land and willed it to his heirs.

The Yakima tribe has their own inheritance law concerning the non-Yakima heir under espousal rights section.

There are numerous cases of this type and the heirs insist they are provided due process procedures before their land is taken from them.

Families sacrifice their rental income to develop land to make it productive farm agriculture land beneficial to the economy of Washington State.

Senator ANDREWS. This hearing is adjourned.

[Whereupon, at 11:05 a.m., the hearing was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

WILKINSON, BARKER, KNAUER & QUINN
LAW OFFICES
1735 NEW YORK AVENUE, N. W.
WASHINGTON, D. C. 20006

(202) 783-4141

CABLE: "WILBAR"

TELEX: (710) 822-9349

ERNEST L. WILKINSON
(1899-1978)
ROBERT W. BARKER
ROSEL H. HYDE
EARL P. STANLEY
PAUL S. QUINN
LEON T. KNAUER
RICHARD ANTHONY BAENEN
PIERRE J. LAFORCE
GORDON C. COFFMAN
ROBERT B. MCKENNA, JR.

GLEN A. WILKINSON
LUD ASHLEY, P.C.
PATRICIA L. BROWN
OF COUNSEL

BRUCE T. REESE
L. ANDREW TOLLIN
KENNETH E. SATTEN
F. THOMAS MORAN
KENNETH D. PATRICH
LUISA L. LANCETTI
WULF GORDIAN HAUSER*
PATRICIA A. GOTSCHALK
RICHARD H. MARSH**

*NEW YORK AND AUSTRIAN BARS ONLY
**UTAH BAR ONLY

August 8, 1984
RECEIVED AUG 0 9 1984

The Honorable Mark Andrews
Chairman
Senate Select Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Re: House Joint Resolution 158

Dear Mr. Chairman:

On behalf of the Wichita and Affiliated Tribes, we submit this statement for the record of the hearings held on H. J. Res. 158, on July 31, 1984. We appreciate the opportunity to comment on these proposed revisions to the Indian Land Consolidation Act.

The Wichita and Affiliated Tribes strongly support the purpose of the Indian Land Consolidation Act and urge that Congress foster land consolidation in Oklahoma by extending Section 2 of the Indian Reorganization Act to Oklahoma Tribes. (25 U.S.C. § 462) Section 2 extends indefinitely the trust status of allotted lands. The fractionalization and diminishment of the Indian land base, brought about by allotment, has been more evident in Oklahoma than anywhere else.

The inability of Oklahoma Indians to obtain the advantages of Section 2 has become an increasingly irrational discrimination. Congress has substantially erased the differences between IRA and non-IRA Tribes and the Land Consolidation Act continues that policy by applying Section 5 of the IRA to Tribes which have not elected IRA status.

Yet, unlike Indians elsewhere, Oklahoma Indians do not have the security of knowing that the trust status of their lands will continue. The trust period is renewed every five years. This uncertainty prevents long-term planning, reduces future opportunity for tribal land consolidation, and subjects Oklahoma Indians to undue bureaucratic and political pressure. It is time that this discrimination ended. Therefore, we strongly urge that House Joint Resolution 158 be amended to include a provision

which extends Section 2 of the Indian Reorganization Act to Oklahoma Indians.

As a final point, the Wichita and Affiliated Tribes have experienced some problems with the escheat provision of the Indian Land Consolidation Act. There is resentment among Tribal members about this provision. The Wichita, therefore, support revisions of this provision which would provide compensation or allow Tribes to develop their own plans which would apply in lieu of the escheat provisions in the Act.

Thank you for your consideration of our comments.

Respectfully submitted,

WILKINSON, BARKER, KNAUER & QUINN

Patricia L. Brown

cc: Newton Lamar
Members of Wichita Executive Committee

THE INDIAN LAND CONSOLIDATION ACT OF 1983

(P.L. 97-459; 25 U.S.C. 2201-2210)

An analysis of the Act and amendments proposed to H.J. Res. 158, a bill to make technical amendments to the Act.

Prepared by staff of the
Senate Select Committee on Indian Affairs

July 13, 1984

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LEGISLATIVE BACKGROUND

The Indian Land Consolidation Act (Act of January 12, 1983; 25 U.S.C. 2201 - 2210) originated in the House of Representatives as an amendment to S. 503, a bill to provide legislative authority for the Devil's Lake Sioux Tribe of North Dakota to establish a land consolidation program and also provide for restriction on the descent of lands held in trust on that reservation. The House amendment added a new Title II to provide among other things: general authority for tribes to adopt codes of their own to accomplish purposes similar to those contained in the Devil's Lake Sioux bill.

The Indian Land Consolidation Act (ILCA) was introduced in the House by Mr. Udall as H.R. 5856. Hearings were held by the House Committee on Interior and Insular Affairs on May 20, 1982. The bill was supported by the Administration. As stated in the House Report (H. Rpt. No. 97-908), the purpose of the Act is to allow Indian tribes: (1) to consolidate their tribal landholdings; (2) to eliminate certain undivided fractionated interests in Indian trust or restricted lands; and (3) to keep trust or restricted lands in Indian ownership by allowing tribes to adopt certain laws restricting inheritance of Indian lands to Indians.

S. 503, as amended, was returned to the Senate during the "lame duck" session. The Senate accepted the House amendment without hearings of its own. While the Report of the House Committee correctly set forth the bill as ordered reported, the bill actually voted on by the House and Senate was garbled in the printing. It was this garbled version of Title II that was signed by the President. To correct this printing error, H.J. Res. 158 was introduced by Mr. Udall early in the 1st session of the 98th Congress. H.J. Res. 158 was passed by the House without additional hearings, and in the Senate was referred to the Select Committee on Indian Affairs for consideration. Hearings were held by the Select Committee on July 26, 1983, at which time a number of amendments were proposed. The most serious objections to the Act related to the provisions of Section 207 providing for escheat of fractional interests of 2% or less in a parcel of land when such interest has earned less than $100.00 in the preceding year before it is due to escheat.

BACKGROUND AND NEED:

One of the outstanding problems in Indian law is the problem of fractionation of ownership of individually owned Indian trust or restricted lands. The problem stems from legislation exemplified by the General Allotment Act of 1887 (Act of Feb. 8, 1887; 24 Stat. 339) breaking up tribal land holdings and allotting such lands to individual Indians. Although the law has, from an early date, authorized Indians to devise their interests in trust or restricted land through a will, as a practical matter a great deal of the land passed to Indian heirs through intestate succession, thus dividing ownership among all surviving heirs.

Within two generations, or approximately 40 years, after embarking on the course of allotting tribal lands to individual Indians under the policies of the General Allotment Act of 1887, the Government became acutely aware of problems associated with fractionation of individual Indian land titles. A particularly good survey of the problem and Congressional interest in addressing the issue is set forth in a law review article by Ethel J. Williams, in the Washington Law Review, Vol. 46, p. 709 - 744, published in 1971. As noted in that article, the Government has been aware of the problem since at least 1926 when the Meriam Report was requested by the Secretary of the Interior. (See WLR, p. 713). There are approximately 12 million acres of alloted trust or restricted land, most of which is in multiple ownership. About half the allotted land in "heirship status" is owned by six or more heirs. (WLR, p. 712). The ownership interest is often de minimus, resulting in issuance of leasehold payments from the BIA in amounts which at times are insufficient to cover the costs imposed by a bank to cash the check. (WLR, p. 712).

In the 86th Congress extensive studies of the problem were undertaken by both the House and Senate Committees on Interior and Insular Affairs which resulted in published reports by both Committees. The Senate report is titled "Indian Heirship Land Survey" (2 parts) and the House report is entitled "Indian Heirship Land Study" (2 parts). Together these reports measure 4 1/2 inches thick.

As noted in these Reports, the consequences of this fractionation are (1) a complex mix of title interests to individual tracts of land, (2) limitations on the ability of individual owners to dispose of their interests in the land, (3) devaluation of individual interests because of inability to convey full title without consent of all of the heirs, (4) loss of control of rental of the property to the BIA because of inability to secure agreement among all of the heirs or even to locate heirs, (5) erosion of interests of tribal members in individual tracts to non-Indian or non-member Indians, (6) inability to control the conduct of individual heirs with respect to the property due to inapplicability of laws against trespass or conversion to persons owning any undivided interest in property.

From the standpoint of BIA administration, the existence of the heirship problem has:

(1) Increased the number of recordings required in maintaining the official land records.

(2) Increased the number of probate proceedings to be examined in determining current title status.

(3) Complicated the computation of large common fractions in determining ownership of undivided interests where common denominators have reached 54 trillion, billions are not uncommon, and millions are commonplace.

(4) Increased the work involved in answering inquiries concerning family histories in connection with the ownership of undivided interests in land.

(See p. 5, Indian Heirship Land Survey

Income derived from lease of these properties is maintained in separate accounts for the heirs, and with each generation of fractionation the number of these accounts grows while the volume of revenues for the individual account diminishes. (Survey, p. 11).

Costs of probate commonly exceed the value of property probated. The 1960 Indian Heirship Land Survey included the following analysis of costs of probate of two Indian estates of members of the Shoshone and Arapahoe Tribes of Wind River Reservation in Wyoming. Survey (49-52)

EXHIBIT NO. 1

COPY OF PROBATE DETERMINATIONS IN THE ESTATE OF DENNIS GARY TARNESS, DECEASED UNALLOTTED INDIAN OF THE SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, WYO. (1956)

Dennis died possessed of undivided fractionated interests in 11 different allotments on the Wind River Reservation. Appraised value of his undivided interests in the 11 allotments is $15.42. It is estimated that the cost of holding hearings and probating the estates of deceased Indians is approximately $150 each, plus an estimated $100 for the cost of preparing the inventory of the estate and assembling other information needed prior to the holding of hearings by the examiner of inheritance. Thus the cost of probate was approximately $250 for an estate involving real property valued at $15.42. The annual administrative cost, in addition to the probate cost, probably exceeds $150 for recordkeeping, leasing, and dividing the income which accrues from leases and placing it in the accounts of the three individual heirs. A considerable additional cost would be involved in the sale or disposition of these undivided interests in order to transfer and vest title to an individual owner. This would involve making field appraisals on each of the 11 allotments, preparation and execution of deeds or issuance of patents at an estimated cost of $900.

EXHIBIT 2

PROBATE FILE OF HELEN BEAR FRIDAY OLDMAN YBARRA, DECEASED UNALLOTTED INDIAN OF THE ARAPAHO TRIBE, WIND RIVER RESERVATION, WYO. (1955)

This individual died possessed of small, undivided interests in 18 allotments on the Wind River Reservation, Wyo., which have been evaluated at $383.86. She also owned an undivided

one-eighteenth interest in an allotment on the Fort Belknap Reservation, Mont., evaluated at $111.11, making the total value of real property in the estate $494.97. The heirs of the decedent are the husband, who is a non-Indian, and three children. The distribution of interests differs between the two States in which the real property is located. The non-Indian husband acquired by inheritance an undivided one-half interest in the real property in Wyoming and an undivided one-third interest in the property in Montana. These interests, because of his being a non-Indian, become unrestricted by operation of law. This individual is entitled to patents-in-fee for his undivided interests in 18 allotments. The unrestricted interests owned by the non-Indian husband reduce the value of the undivided trust interests to $247.49. It is estimated that the work involved in the probating of this estate amounts to approximately $300. The annual costs in recordkeeping, leasing, and division of rental income are estimated to exceed $300. The issuance of 18 patents-in-fee to the non-Indian husband, in accordance with existing regulations, is estimated to cost approximately $25 each, or $450. To convey these undivided interests to a single ownership would require detailed appraisals of the 18 allotments, and the preparation, execution, and recording of deeds or patents, the cost of which would exceed $1,500. These expenditures involve trust property valued at less than $300.

This second probate file is particularly interesting because it illustrates the manner in which Indian and non-Indian interests become intermixed through operation of state laws of descent and the erosion of the Indian land base that is thus occuring.

A compelling analysis of problems associated with fractionated interests, both from the standpoint of the individual owner and the administering agency, appears in a paper by Michael L. Lawson, Historian with the Department of the Interior, entitled "Heirship: The Indian Amoeba", prepared for delivery at the 75th Annual meeting of the Organization of American Historians in 1982. The paper specifically addresses the status of allotments on the Lake Traverse Reservation in North and South Dakota.

Sisseton-Wahpeton Allotment No. 1385 on the Lake Traverse Reservation provides an extreme example of the present complexity of the heirship problem for it may well be one of the most fractionated parcels of land in the world. The original allottee, a member of one of the most prominent and prolific Sisseton families, died in 1891. By 1937 there were 150 heirs to the allotment and probating the estate cost $2,400 and required more than 250 typewritten pages. At present there are 439 heirs and the lowest common denominator (LCD) used to determine fractional interests is 3,394,923,840,000.

A portion of the allotment consisting of forty acres of farmland is currently leased at the rate of $1090 per year. When it comes time to distribute this money, it requires three full days for a realty clerk to calculate the heirship interest values. A breakdown of the current lease distribution reveals that more than two-thirds of the heirs receive less than $1.00 per year from the estate, that approximately one-third receive less than 5 cents, and that the interest of 100 of the heirs entitles them to a fraction of one cent. The largest interest holder receives $82.85, but the value of the smallest heir is $.0000564. At the current lease rate, it would require 177 years for the smallest heir to earn one cent, and 88,652 years to accumulate $5.00, which is the minimum amount for which the Bureau of Indian Affairs will issue a check. If this portion of the allotment was sold at its appraised value of $9000, the share of the smallest heir would be $.000418, and if it were physically partitioned, the smallest heir would be given title to approximately 13 square inches.

A statistical analysis of thirty of the most heavily fractionated allotments on Lake Traverse reveals that the average estate has 196 heirs, and that the average heir holds interests in 14 other allotments. If these tracts were sold, the average payment to the smallest heir would be 36 cents, and if partitioned the smallest heir would be entitled to 174 square feet. At the current average lease rate it would require the smallest heirs an average of 1344 years to realize $5.00 from these estates.

The management of such infinitesimal heirship interests constitutes an enormous administrative burden on the Bureau of Indian Affairs. On the comparatively small Lake Traverse Reservation it requires the full attention of five realty and probate specialists to oversee the 86,586 acres now in heirship status, the overwhelming proportion of which are leased to non-Indians. In 1981 these individuals handled the documentation and accounting for 2000 leases and 40 probate hearings. By their estimate it cost approximately $40 per heir to transact an allotment lease. This means that the Bureau of Indian Affairs will expend $17,560 per year to administrate the current lease on the highly fractionated Allotment No. 1305, which will bring in a total revenue of only $1080 for the heirs.

See Heirship: The Indian Amoeba, pp. 9-11

HISTORY OF LEGISLATION:

As early as 1934 with enactment of the Indian Reorganization Act (Act of June 18, 1934; 48 Stat. 984; 25 U.S.C. 461 et seg.) Congress began to tentatively address the issue through restriction on devise or descent of interests in trust property and provision for

Secretarial acquisition of interests in land. (See Sec. 4 and 5, I.R.A.). From 1946 through 1976 at least 38 bills (some identical to each other) were introduced in the Congress to further address this issue. A list of these bills and the names of their sponsors appears in Appendix A. Many of these bills were directed toward partition or sale of allotted lands; others would simply have removed the trust or restricted status from the land, allowing consolidation of title through application of state laws on partition, taxation with concommitant forfeitures, or laws of adverse possession. Others were far more sensitive to the issue and strove to protect the Indian land base while still providing for consolidation of title.

Among the more serious legislative efforts were bills introduced by Senator Frank Church of Idaho, the last of which was S. 1049 in the 88th Congress; H.R. 11113 introduced by Congressman Wayne Aspinall of Colorado in the 89th Congress; S. 522 introduced by Senator Henry Jackson in the 91st Congress; and H.R. 14417 introduced by Congressman Lloyd Meeds in the 94th Congress. The Jackson bill (S. 522) would have increased the appropriation authorization for the BIA revolving loan fund from $20 million to $55 million; the Church bill (S. 2899, 87th Cong.) would have increased authorization for this fund to $50 million.

The Indian Land Consolidation Act adopts a number of the constructive proposals that appeared in these various legislative proposals; it does not include highly controversial proposals such as authorization of partition and sale; and it does not include any new authorization for funding for acquisition of interests in land, whether fractionated or not.

In addition to providing for development of tribal land consolidation programs and development of tribal inheritance codes, the Indian Land Consolidation Act attempts to address this problem of fractionalized ownership by authorizing tribes to acquire complete ownership of a parcel of land with the consent of 50% of the owners or with the consent of the owners of over 50% of the interest in such land, and further provides for the escheat of any fractional interest in trust or restricted land which is 2% or less of the entire title and has earned less than $100.00 in the preceeding year before it is due to escheat.

SUMMARY EXPLANATION OF INDIAN LAND CONSOLIDATION ACT:

The Indian Land Consolidation Act is designed to achieve four major objectives: (1) authorize tribes, with the consent of the Secretary of the Interior, to sell or exchange tribal trust land in accordance with the terms of a land consolidation plan, and authorize the Secretary to take newly acquired land into trust; (2) authorize tribes to enact tribal codes to govern and limit the inheritance of real property held in trust or restricted status; (3) provide authority for tribal acquisition of fractional interests in trust or restricted land; and (4) provide for the escheat to the tribes of extremely small fractional interests in trust or restricted lands.

A. Land Consolidation.

The need for legislation on this subject arises from two facts: (1) Tribes generally cannot sell or dispose of tribal trust lands without an Act of Congress authorizing such sale, and (2) the provisions of Section 5 of the Indian Reorganization Act of 1934 (25 U.S.C. 465) which authorizes the Secretary of the Interior to take lands into trust for a tribe are not applicable to tribes, such as the Devil's Lake Sioux, that voted to reject the 1934 Act.

Section 203 of ILCA (25 U.S.C. 2202) extends the provisions of Section 5 of the IRA to all Indian tribes irrespective of whether they previously rejected application of that Act in its entirety. In addition, Section 204 of ILCA (25 U.S.C. 2203) authorizes the tribes to develop a land consolidation plan to be approved by the Secretary of the Interior. Once the plan is approved, the tribe is authorized to sell or exchange tribally owned property without the need for special legislation, but all funds derived from any such sale or exchange must be utilized to purchase replacement property that shall be taken into trust.

B. Tribal Inheritance Codes.

The authority of an Indian tribe to prescribe the manner of descent and distribution of the property of its members was recognized at an early date. The authority extends to personal as well as real property. It was recognized that a tribe might restrict the descent of property on the basis of Indian blood or tribal membership, and might provide for escheat of property to the tribe where there were no recognized heirs. (Opinion of the Solicitor, Dept. of the Interior, Opinion of October 25, 1934, pp. 445 at p. 462; Cohen, Handbook of Federal Indian Law (1940 Ed.), Chpt. 7, Sec. 6, p. 139; Jones v. Meehan, 175 U.S.1 (1899). This authority continued so long as no contrary legislation was enacted by the Congress. While this authority generally remains intact with respect to personal property, a series of Federal statutes have effectively pre-empted this inherent tribal power with respect to lands that are held in trust or restricted status.

The General Allotment Act of 1887 was the first of these statutes. Among other things it provided that the law of descent in force in the State or Territory where allotted lands were situated would govern descent of trust allotted lands. (Act of Feb. 8, 1887, Sec. 5; 24 Stat. 389; 25 U.S.C. 348). Although the right of individual Indians to dispose of their property by will had previously been recognized, in 1910 Congress enacted comprehensive legislation to govern descent of trust property and, among other things, specifically provided that any Indian having an interest in trust or restricted property could dispose of that interest" by will, in accordance with regulations prescribed by the Secretary of the Interior". In the event a will should be disapproved (found legally insufficient or defective), then the property should descend under the laws of the State where the property was located. (Act of June 25, 1910, Sec. 2; 36 Stat. 856; 25 U.S.C. 373).

In 1934, with enactment of the Indian Reorganization Act, Congress significally restricted the right of an Indian to dispose of trust or restricted land by will. The legislation, as originally introduced in both the House and Senate, would have limited the right of an Indian to devise trust or restricted property to members of his or her own tribe. In recognition of the fact that in some instances a decedents' heirs might not be a member of the tribe to which the decedent belonged, the legislation was broadened to allow a devise of trust or restricted property to: (1) the tribe in which the land is located; (2) any member of the tribe in which the lands are located; or, (3) any heir of the decedent, whether or not such heir is a member or non-member of an Indian tribe. (Act of June 18, 1934, Sec. 4; 48 Stat. 985; 25 U.S.C. 464). (See, Opinions of the Solicitor, Department of the Interior, Opinion of August 17, 1934, p. 427; 54 Interior Decisions 584). The term "heir" is defined by the law of the state in which the trust property is located, and means any person who by law would inherit from the decedent if there was no will.

In 1980, Congress amended this section of the IRA to provide a limited expansion on the class of people to whom an Indian could devise his trust property by authorizing such devise not only to the decedent's heirs, but also to any lineal decedent or any other Indian person for whom the Secretary of the Interior determines that the United States may hold lands in trust. (Act of September 26, 1980, Sec. 1; 94 Stat. 1207). This amendment was required because of recent changes in laws of various states providing for spousal inheritance of the entirety of an estate to the exclusion of lineal descendants in cases of intestacy.

This restriction on testamentary capacity of Indians does not apply to persons owning an interest in restricted lands within the former reservations of the Five Civilized Tribes, though other limitations may be applicable. Similarly, the Osage Tribe is also governed by a separate set of laws.

In recent years, Congress has been called upon to enact special laws to govern inheritance of trust or restricted lands on behalf of individual Indian tribes. Tribes for which special Act have been enacted include the Yakima, Nez Perce, Umatilla, Confederated Tribes of Warm Springs, Standing Rock Sioux, and Devil's Lake Sioux.

Section 206 of ILCA authorizes Indian tribes, subject to the approval of the Secretary of the Interior, to adopt their own code of laws without specific enactment by Congress. This authority tracks the tribal specific legislation previously enacted for individual tribes.

C. Acquisition or Escheat of Fractional Interests:

In addition to providing for development of tribal land consolidation programs and development of tribal inheritance codes, the Indian Land Consolidation Act attempts to address this problem of fractionalized ownership by authorizing tribes to acquire complete ownership of a parcel of land with the consent of 50% of the owners or with the consent of the owners of over 50% of the interest in such land, and further provides for the escheat of any fractional interest in trust or restricted land which is 2% or less of the entire title and has earned less than $100.00 in the preceeding year before it is due to escheat.

III. SECTION-BY-SECTION ANALYSIS

The following is a section-by-section analysis of the Indian Land Consolidation Act of 1983 as it was reported out of the House Committee on Interior and Insular Affairs (H. Rept. 97-908) and as it was intended to have been enacted. The Act has been correctly codified in Title 25, United States Code, sections 2201-2210.

Sec. 201. Short Title. This section provides that this Act may be cited as the "Indian Land Consolidation Act".

Sec. 202 (25/2201). Definitions. This section provides definitions for the terms "tribe", "Indian", "Secretary", and "trust or restricted lands" for the purposes of the Act.

The terms "tribe", "Secretary", and "trust or restricted lands" have definitions that are common to most Indian legislation. The term "Indian" has a somewhat broader definition than that found in most Indian legislation. "Indian" is defined as any person who is a member of a Federally recognized tribe "or any person who is recognized as an Indian by the Secretary of the Interior". A similar definition of this term was used in P.L. 96-274 providing a Congressionally enacted inheritance code for the Standing Rock Sioux Tribe and also in P.L. 96-363 amending Section 4 of the Indian Reorganization Act of 1934 (Act of Sept. 26, 1980; 94 Stat. 1207; 25 U.S.C. 464). In defining the term in this fashion, it is the intent that the term "Indian" include any person the Secretary determines to be eligible to have lands held in trust status.

Sec. 203 (25/2202). Other Applicable Provisions. This section extends to all Federally recognized Indian tribes the provisions of Section 5 of the Indian Reorganization Act of 1934 (48 Stat. 985; 25 U.S.C. 465) irrespective of whether or not a tribe voted to reject the Act as provided under Section 18 of the Act (48 Stat. 988; 25 U.S.C. 478). In addition, it is specifically provided:

> "That nothing in this section is intended to supersede any other provision of federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).

In explanation of this provision, the House Report states "The intent of the Committee is not to overrule any Act of Congress that explicitly purports to regulate land acquisitions and disposals within a specific area or for a specific tribe, unless such Act has already been amended or considered superseded by Section 5 of the Indian Reorganization Act." (H. Rept. 97-908), p. 7). This proviso and the Committee explanation track the

recommendation of the Department of the Interior in its communication to Chairman Udall dated September 9, 1992. As an example of legislation which should not be deemed superseded, the Department cited 25 U.S.C. 635 governing disposition of Navajo lands, and additionally recommended that the provision should not be applicable in Alaska or Maine where Congress had enacted land claim settlement legislation. (H. Rept. 97-908, pp. 12, 14). The proviso to Section 203 of the Indian Land Consolidation Act of 1983 accomplishes this purpose.

Sec. 204 (25/2203). Adoption of Land Consolidation Plan With Approval of Secretary. This section authorizes tribes to adopt land consolidation plans providing for the sale or exchange of any tribal lands or interests in lands. Such plan is subject to the approval of the Secretary. Once the Secretary has approved the plan, he may not refuse to execute any deeds or patents or other instruments or conveyance needed to effectuate a sale or exchange unless he makes a specific finding that such sale or exchange is not in the best interest of the tribe or is not in compliance with the plan. The purpose of the section is to enable tribes to consolidate or otherwise improve the tribal land holdings. For this reason, it is specifically provided that any proceeds from the sale or exchange of tribal land can only be used for the purchase of other land or interests in land. The Secretary is directed to maintain a separate trust account for any tribe selling or exchanging land pursuant to this section and may only release such funds for the purpose of purchasing replacement lands, which shall be taken into trust. (See, Sec. 210, 25/2209). Tribes may retain mineral rights to lands they sell or exchange. The Secretary is directed to assist tribes in determining the value of mineral rights and must consider the value of such mineral rights in determining the fair market value of any tribal lands to be sold or exchanged.

This section provides the first general authority for the sale of tribal lands without specific Congressional approval. Section 4 of the Indian Reorganization Act of 1934 (25 U.S.C. 464) and Section 1 of the Oklahoma Indian Welfare Act (49 Stat. 1967; 25 U.S.C. 501) do provide general authority for the Secretary of the Interior to allow exchanges of tribal land, but these Acts do not provide authority for the sale of tribal trust lands, even where the proceeds of such sale will be used to acquire replacement lands in trust. In recent years, Congress has, at the request of individual tribes, enacted laws providing for tribal land consolidation, including authority for sale of tribal lands to facilitate the consolidation process. See, P.L. 84-188, 69 Stat. 392, 25 U.S.C. 608 (Yakima - 1955); P.L. 90-335; 82 Stat. 174, 25 U.S.C. 487 (Spokane - 1968); P.L. 90-534, 82 Stat. 884, 25 U.S.C. 610 (Swinomish - 1968); and, P.L. 93-491, 88 Stat. 1468 (Sisseton-Wahpeton Sioux - 1974). With enactment of Title I of P.L. 97-459, the Devil's Lake Sioux Tribe was added to the growing list of individual enactments.

The Indian Land Consolidation Act of 1983 (Title II of P.L. 97-459) does not repeal the provisions of the Indian

Reorganization Act of 1934, the Oklahoma Indian Welfare Act of 1936, or any of the tribally specific land consolidation Acts listed above. To the extent that Section 204 of the Act provides authority to the Secretary to approve a sale of tribal trust lands in accordance with the tribal land consolidation plan, it is inconsistent with and supersedes the limitation contained in Section 4 of the Indian Reorganization Act (25 U.S.C. 464). However, unless a tribe adopts a tribal land consolidation plan as provided by Section 204, the restrictions on alienation contained in Section 4 of the Indian Reorganization Act continue in full force and effect.

Section 204 of the Act (25 U.S.C. 2203) provides that "Notwithstanding any other provision of law", a tribe is authorized to adopt a land consolidation plan. Thus, to the extent, Section 204 of the Indian Land Consolidation Act provides authorities beyond that provided in the Acts specifically enacted for individual tribes, the authorities provided in this section are available to those tribes at their option.

Sec. 205 (25/2204). Purchase of Trust or Restricted or Controlled Lands At No Less Than Fair Market Value; Requisite Conditions. This section provides that a tribe may purchase, at fair market value, all of the interests in any tract of trust or restricted land within a reservation, or otherwise within the tribe's jurisdiction, with the consent of over 50% of the owners, or with the consent of the owners of over 50% of the undivided interests in a tract. This provision is subject to the condition that:

(1) The section does not apply to any parcel of land in which there are fewer than 15 owners;

(2) In the case of a parcel in which there are 15 or more owners if a tribe proposes to acquire complete title to such a parcel (100% of the interests), then any Indian owning any undivided interest in the land and who is in actual use and possession of the land, may purchase such tract by matching the tribal offer;

(3) In the case of a parcel of land in which there are 15 or more owners, even if the tribe succeeds in obtaining the consent of more than 50% of persons having fractional interests in the land to purchase of the entire title (100% of the interests), if three or less persons who jointly own over 50% or more interest in the land object to such acquisition, the tribe will be barred from acquiring complete title under this section; and

(4) All purchases and sales of lands initiated under this section must be approved by the Secretary of the Interior.

This section provides conditional authority for a tribe, acting through its tribal government, to acquire fractional

interests of any person in trust or restricted land without the consent of such individual fractional owner. The authority extends only to a tribe, not to individual Indians; and it applies only to tracts of land in which there are 15 or more owners of undivided interests. To acquire the interests in such a tract, the tribe must pay fair market value. Any purchase or sale under this section must be approved by the Secretary of the Interior. Since the Secretary must approve such a transaction, the Secretary would have to establish a fair market value through a Secretarial appraisal.

In order to acquire the interest of non-consenting fractional owners, the tribe must first acquire the consent of (1) 50% or more of the persons owning fractional interests in the tract of land, or (2) the consent of persons owning 50% or more of the interest in the property. If three or less persons owning a 50% or greater interest in the property object to tribal acquisition, then the tribe is prohibited from acquiring any interest in the property, except as presently provided in 25 CFR 151.7

Finally, if a tribe is able to meet the above conditions and is thus in a position to acquire 100% interest in a tract of land, if any Indian who owns a fractional interest in the property and who is in actual use and possession of such tract desires to acquire complete title, he or she may do so by matching the tribal offer.

Sec. 206 (25/2205). Descent and Distribution of Trust or Restricted or Controlled Lands; Tribal Ordinance Barring Non-Members of Tribe or Non-Indians From Inheritance By Devise or Descent. This section authorizes Indian tribes to adopt tribal inheritance codes to restrict the right of non-Indians or non-members to inherit interests of their tribal members in trust or restricted lands situated within that tribe's reservation or otherwise subject to that tribe's jurisdiction. Although Indian tribes have inherent authority to enact inheritance codes, because the legal title to trust lands is held by the United States, tribes may not control the descent and distribution of trust property without the consent of the United States. Property held under a restricted fee patent is subject to the same limitation on tribal power.

Section 206 authorizes Indian tribes to enact their own inheritance codes to provide more restrictive limitations on rights of inheritance than is presently found in the general Federal law. This section supercedes any other provisions of law. (This includes tribes in Oklahoma. See discussion below). It provides that any Indian tribe, through enactment of its own code, may restrict non-Indians or non-members of the tribe from inheriting by devise or descent any interest of a member of the tribe in trust or restricted land within the reservation or otherwise subject to that tribe's jurisdiction. However, there are limitations on the exercise of this authority.

(1) If the member dies intestate (without a will), the surviving non-Indian or non-member spouse and/or children shall be entitled to a life estate in as much of the trust or restricted lands as he, she, or they would have been entitled to take under existing general Federal law.

(2) If the member dies intestate (without a will) and leaves no heir who is eligible to inherit the interest in trust or restricted land, then the decedent's interest shall escheat to the tribe. This provision is subject to the right of the non-Indian or non-member spouse and/or children to a life estate.

(3) If the member dies leaving a will and has devised interests in trust or restricted lands to persons whose eligibility for such inheritance is restricted by reason of the tribal ordinance, then the devise shall be voided only if, while the estate is pending before the Secretary of the Interior for probate, the tribe pays to the Secretary the fair market value of such interest. Even if the tribe makes such an offer, if the beneficiary named in the will is a surviving non-Indian or non-member spouse and/or children of the decedent, they may elect to retain a life estate in the interest devised, or be compensated by the tribe for the value of such interest.

As a general rule, the descent of trust or restricted property, i.e., the determination of "heirs" in the absence of a will, is governed by reference to the laws of the state in which the property is located. Within the limitations discussed above, this section is intended to authorize tribes to enact codes to establish limitations on the rights of non-Indians or non-members to inherit trust or restricted property. One of the motivating factors for enactment of the Umatilla Act (25 U.S.C. 463d nt.; P.L. 95-264) was disagreement of the tribe with a recent amendment of Oregon state law that changed the order of intestate succession to real property to grant a surviving spouse a one-half interest in the descendant's estate rather than simple life estate in such share. The tribe wished to return to the prior law. (H. Rept. 95-820 to accompany H.R. 2540, 95th Cong., 1st Sess.). The Standing Rock Sioux Act (P.L. 96-274) was enacted to, among other things, overcome a situation where the laws of intestate succession in North Dakota and South Dakota differed resulting in different inheritance rules for members of that tribe, depending on which side of the state line their property was situated. (H. Rept. 96-743 to accompany H.R. 2102, 96th Cong., 2d Sess.).

The provisions of this section of the Act supersede any other provisions of law, and it extends this authority to all tribes with respect to trust or restricted lands within the tribe's

reservation "or otherwise subjected to that tribe's jurisdiction". It was intended by this language to extend the benefits of this provision to tribes which have had their reservations diminished or disestablished as long as there are still trust or restricted lands located within the former or diminished reservations. (H. Rept. 97-908, p. 8). In its proposed amendments to the House bill (H.R. 5855, 98th Cong.), the Administration recommended deletion of the language "otherwise subject to tribal jurisdiction" and recommended instead inclusion of a definition of "reservation" which would have included certain lands within the State of Oklahoma. (H. Rept. 97-908, pp. 15-16). It is not clear whether the Administration language would have included lands within the former reservations of the Five Civilized Tribes and the existing Osage reservation. However, it is clear that the language "otherwise subject to tribal jurisdiction" was meant to include trust or restricted lands within the State of Oklahoma. This language is included in the Act as finally passed.

The authorities of this section extend to tribes for which the Congress has already enacted specific inheritance laws. Thus, tribes such as Yakima, Nez Perce, Umatilla, Confederated Tribes of Warm Springs, Standing Rock Sioux, and Devil's Lake Sioux are authorized to enact tribal codes under this section and those codes would supersede the existing Federal law governing descent or inheritance on those reservations.

Sec. 207 (25/2206). Escheat to tribe of trust or restricted or controlled lands. This section provides that no undivided fractional interest in any tract of trust or restricted land shall descend by intestacy or devise, but shall escheat to the tribe having jurisdiction over the land if such fractional interest represents 2% or less of the total acreage in such tract and has earned to its owner less than $100.00 in the preceding year before it is due to escheat. The restriction applies to both intestacy and devise and thus these small fractions of interests simply cannot be inherited whether or not the decedent leaves a will referring to such interests.

Sec. 208 (25/2207). Full faith and credit to tribal actions under ordinances limiting descent and distribution of trust or restricted or controlled lands.

This section provides that the Secretary of the Interior, in carrying out his responsibility to regulate the descent and distribution of trust lands under section 372 of Title 25, U.S.C., and other laws, shall give full faith and credit to any tribal actions taken pursuant to section 206 (25 U.S.C. 2205) which authorizes tribes to enact their own inheritance codes. This provision only applies to estates of persons whose deaths occur on or after the effective date of such tribal ordinances.

Under the provisions of the Act of June 25, 1910 (36 Stat. 855; 25 U.S.C. 372, 373),in the case of any Indian who dies owning an interest in trust or restricted land, the Secretary of

the Interior is charged with various responsibilities, including determination of the validity or approval of such person's will, or, in the case of intestacy (where a person dies without a will), determination of such person's heirs at law. This function is known as probating of an estate. Section 208 of ILCA does not affect this Secretarial responsibility but does require that in administering the probate of an estate involving trust or restricted lands, that he abide by and give effect to the laws duly enacted by the tribe having jurisdiction over the land.

Sec. 209 (25/2208).- Conveyancing authority upon sale or exchange of tribal lands; removal of trust status of individually owned lands.

This section authorizes the Secretary to issue deeds, patents, or other instruments of conveyance needed to effectuate a sale or exchange of tribal lands made pursuant to the land consolidation provisions of ILCA, and, at the request of an Indian owner, to remove the trust status of individually owned lands or interests therein, where authorized by law.

The authority granted the Secretary in this section with respect to tribally owned land complements the provisions of Section 204 (25 U.S.C. 2203). Insofar as removal of trust status of individually owned land, this section does not grant any new authority but only provides for such removal where already authorized by law.

Sec. 210 (25/2209). Trusteeship title of United States for any Indian or Indian Tribe.

This section provides that any land acquired under ILCA by any Indian or Indian tribe shall be taken in trust by the United States for such Indian or Indian tribe.

Sec. 211 (25/2210). Tax exemption..

This section provides that all lands or interests in lands acquired by the United States for an individual Indian or an Indian tribe under the provisions of ILCA shall be exempt from Federal, State and local taxation.

ANALYSIS OF HEARING

July 26, 1983

On July 26, 1983, the Select Committee on Indian Affairs held a hearing on H.J. Res. 158, a bill to correct certain technical errors in the Indian Land Consolidation Act (ILCA) as enacted in the 97th Congress. This was the first hearing held by the Select Committee on this legislation. A number of recommendations were made with respect to this Act, including a recommendation that the entire Act be repealed and the legislative effort be recommended. At the opposite end of the spectrum, it was also recommended that no action be taken on the bill until the Act had been in effect for at least one year so that the Indian people and the Congress would have an opportunity to see the effect of the Act.

For the most part, the testimony of the various witnesses supported the general outlines of the Act and supported the Congress for finally entering into this subject area. There were, however, a number of recommendations for substantive amendments that are highly worthy of consideration. The most serious criticism of the Act related to the provisions of Sections 207 providing for escheat of fractional interests of 2% or less which have earned less than $100.00 in the year preceding escheat. The purpose of this section is to discuss the various recommendations for amendments. These proposed amendments will be considered in the order of the section of the Act to which they refer.

(1) Definition of "Indian" - (Sec. 202; 25 U.S.C. 2202).

Sec. 202 of ILCA defines "Indian" as "any person who is a member of a tribe or any person who is recognized as an Indian by the Secretary of the Interior." The intent of ILCA is to provide as far reaching an authorization to tribes as possible while still assuring that property will remain in trust status. For this reason, a broad definition of Indian was employed. The phrase "any person who is recognized as an Indian by the Secretary of the Interior" is intended to cover any person of Indian descent for whom the Secretary concludes land may be held in trust or restricted status. This language is taken from legislation enacted in the 96th Congress providing special legislation to govern inheritance of trust lands on the Standing Rock Sioux Reservation (P.L. 96-274), and Section 4 of the Indian Reorganization Act, as amended, in 1980 (94 Staat. 1207; 25 U.S.C. 464).

(2) Land Consolidation Plan - Authority To Sell Lands For Purposes of Land Consolidation.

Sec. 204 of ILCA authorizes any Indian tribe to sell or exchange lands owned by the tribe for the purpose of acquiring

replacement lands to be consolidated with other tribal land holdings or eliminating undivided fractional interests in trust or restricted lands. It has been recommended that this authority should be limited to "isolated" tracts of land and that "isolated" should be defined as "a tract wholly surrounded by fee land." If a tribally owned tract is adjoined on any side by a tract of trust or restricted land, the tribe would not have authority to sell such a parcel without resort to a special Act of Congress. The concern of the proponent of this amendment is that the authority to sell is overly broad and that tribes will be subjected to administrative or political pressures to sell lands.

The purpose of this section of ILCA is to give tribes the necessary authority to consolidate tribal land holdings. The section requires that the tribe first adopt a land consolidation plan which is subject to approval of the Secretary of the Interior. Such a plan would have to meet the stated purpose of the Act, i.e., to eliminate undivided fractional interests in Indian trust or restricted land, or to consolidate the tribal land holdings. When any sale or exchange is proposed by the tribe, the Secretary must execute the necessary documents to effectuate the sale or exchange unless he makes a specific finding that the sale or exchange is not in the best interests of the tribe or is not in compliance with the tribal land consolidation plan.

While the authority granted in this section is not limited to "isolated" tracts of land, it is assumed that in most cases it is just such tracts that a tribe would wish to dispose of in order to consolidate the tribal land base. However, it is possible, particularly in the case of trust parcels with fractionated ownership, that a tribe might wish to sell or exchange an interest in land which does abut other trust or restricted land. The proposed amendment would restrict tribal authority in such matters.

The limited purposes of the authority granted in this Act, the fact that the tribe itself develops the land consolidation plan and controls the sale or exchange of its lands, and the fact that the plan and any subsequent sales or exchanges of land must be approved by the Secretary in accordance with the plan, provides significant safeguards against external administrative or political pressures. If a tribe so desires, it can provide in its land consolidation plan that the authority for sale or exchange of tribal lands be limited to "isolated" tracts.

Inclusion of such a provision in a land consolidation plan would not prevent future amendment of the plan, but it would prevent any sale or exchange of a "non-isolated" tract until the plan was amended.

(3) Land Consolidation Plan - Retention of Mineral Rights.

A second amendment proposed to Section 204 would restrict the authority of a tribe to dispose of any mineral rights in lands they decide to sell or exchange under the land consolidation plan. It is noted that tribal retention of subsurface mineral rights on lands it sells or exchanges would have no effect on the problem of fractionation of ownership. More importantly, it is stated that minerals, particularly undeveloped potential oil and gas lands, are not susceptible of an informed or valid market value appraisal.

As a general proposition, it is doubtful if a tribe would want to dispose of mineral rights in any lands in which there were proven or suspected mineral deposits. It is possible, however, that a tribe might conclude that sale of a mineral interest is in the best interests of the tribe. Just as in the case of an "isolated" tract, if a tribe so desires, it can provide in its land consolidation plan that nothing in the plan shall authorize sale or exchange of mineral interests.

As enacted, Section 204 of ILCA does not restrict the authority of tribes to dispose of mineral rights when selling or exchanging lands under the tribal land consolidation plan. It does, however, specifically authorize the tribes to retain mineral rights to such lands and directs the Secretary of the Interior to assist the tribes in determining the value of such mineral rights. In addition, the Act requires the Secretary to take into consideration the value of any minerals in determining the fair market value of lands the tribe proposes to sell or exchange, and any such sale is subject to Secretarial rejection if he concludes the sale is not in the best interests of the tribe.

(4) Tribal Purchase of Trust or Restricted Lands.

Sec. 205 of ILCA authorizes a tribe to acquire complete ownership of a parcel of land with the consent of 50% of the owners or with the consent of the owners of 50% of the interest in such land. A number of amendments have been proposed to this section: (a) that tribal acquisition should be limited to

situations where the owners of 50% of the interest in the land consent; (b) that the tribe should not be compelled to acquire complete title, but should be allowed to acquire fractional interests from consenting interest owners; (c) the right of an individual Indian occupying the land to match the tribal offer be limited to a person who has occupied the land for at least five years; and (d) that the tribe should not be permitted to acquire any mineral interests through the exercise of purchase rights under this provision.

A. An amendment has been proposed that the right of a tribe to acquire complete title should be restricted to circumstances in which the owners of 50% of the whole title consent. As presently enacted, a tribe is authorized to acquire 100% of the ownership interest in a parcel of land if 50% of the owners consent to such acquisition, or if the owners of 50% of the interest in the property consent.

Given the high state of fractionation, it is quite possible that 50% of the persons having an ownership interest might well have considerably less than a 50% interest in the entire title. If this amendment were adopted, it would eliminate the provisions presently included in Section 205 that provides for a veto of three or less owners who own 50% or more of the ownership interest, and remove the provision that limits the tribal purchase right to properties with 15 or more owners.

B. An amendment has been proposed to provide that the tribe should be permitted to acquire any fractional interest in a parcel of land with the consent of the owner of such fractional interest. Under current regulations (25 C.F.R. 151.7), a tribe is substantially restricted in its authority to acquire fractional interests in trust or restricted land. This provision of the C.F.R. restricts the right of a tribe to acquire a fractional interest to lands in which it already owns a fractional interest, the interest being acquired is in fee (non-trust) status, the tribe offers to purchase the entire interest in the parcel, there is a specific law that permits purchase of an undivided fractional interest, or the owner of a majority of the remaining trust or restricted interest consents to the purchase.

In light of the provision of Section 207 of ILCA mandating the escheat to tribes of fractional interests of 2% or less in individual parcels of trust lands where such interest has earned less than $100.00 in the year preceding escheat, it seems

The arguments in favor of elimination of fractional interests apply to mineral interests with as much strength as they do to surface rights. More importantly, if the amendment to allow tribes to acquire fractional interests on the basis of a voluntary or consensual sale is adopted, the argument that a tribe might not want to acquire the mineral interests is diminished, for the determination of whether or not to acquire such interests is then in the hands of the tribe.

5. Tribal Inheritance Codes.

Section 206 of ILCA extends broad authority to Indian tribes to adopt codes of law to limit inheritance of trust or restricted lands within their reservation or which are otherwise subject to the jurisdiction of the tribe. Under the provisions of Section 4 of the Indian Reorganization Act, as amended, (25 U.S.C. 464) the descent or devise of trust or restricted land is limited to (1) the tribe in which the lands are located; (2) any heirs (i.e., any person who under the laws of the state would inherit in the absence of a will); (3) any lineal descendant; or (4) any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust. If a tribe voted to reject the IRA, then the provisions of the Act of June 18, 1910 (25 U.S.C. 372, 373) would apply. Under this Act there is no limitation on the capacity of an individual Indian to dispose of trust or restricted land by will and no limitation on persons to whom such property can descend in the absence of a will except as provided by state law.

The purpose of Section 206 is to authorize tribes to adopt codes of law to provide further restrictions on the right of non-members or non-Indians to inherit trust or restricted lands. This authority is subject to three limitations: (1) the authority is limited to trust or restricted interests of a member of the tribe, not to trust or restricted lands generally; (2) a surviving non-member or non-Indian spouse or children are entitled to a life estate in the interest they otherwise would have inherited; and, (3) in the case of a devise (will) of property to a person ineligible to receive the property because of the tribal code, such devise will be voided only if the tribe acquires such interest by paying fair market value.

Two amendments have been proposed for this section of the Act; (a) the authority of the tribe should extend to all trust or restricted lands within the tribe's reservation or jurisdiction; and, (b) the provision for life estates should be limited to

heirs who occupied the tract as a home at the time of the decedent's death and who, if they had been eligible, would have inherited a substantial interest.

A. The authority of the tribe to enact ordinances should extend to all trust or restricted land within the tribe's reservation or jurisdiction and should not be limited only to the interests of their own members. Arguments in favor of this amendment are that limiting the authority of a tribe to establish restrictions on inheritance of all trust or restricted lands within the tribe's reservation to their own members is inconsistent with the purposes of reducing the number of fractional interests in trust property. In addition, tribes will be reluctant to enact restictive inheritance codes if such codes are only applicable to their own members and do not include all trust or restricted interests within the reservation.

As enacted in the House of Representatives in the 97th Congress, ILCA would have extended the authority of the tribes to all trust or restricted lands within a tribe's reservation or otherwise subject to its jurisdiction. On the Senate side, this provision was amended to limit the tribal authority to interests of their own members. This amendment was prompted by concern for problems which might arise by virtue of more than one tribe occupying a single reservation. At the hearing before the Select Committee on Indian Affairs on July 26, 1983, representatives of the Shoshone and Arapahoe Tribes of the Wind River strongly supported an amendment to extend tribal authority to all lands within a tribe's reservation. They pointed out that this amendment would create no problem at Wind River because the two tribes have a joint business council to enact ordinances governing land policies. A similar council exists between the Kiowa, Commanche and Arapahoe Tribes in Oklahoma for certain land management issues that are common to those three tribes. The existence of such joint councils would appear to fully answer the concerns of the Senate.

B. Limitation of life estates to heirs who occupy the tract as a home. Arguments in favor of this amendment are that the blanket establishment of a right to a life estate irregardless of the interest of the decedent in the property is at cross-purposes with the interest in reducing fractional interests. The proposed amendment would limit the right to a life estate for non-members established under ILCA to a surviving spouse only, and suggests that such life estates apply only to a spouse who occupied the tract as a home at the time of the

decedent's death, and who would have inherited an interest of at least 25% had they been eligible to inherit.

Most states have laws that protect the right of a surviving spouse to take an interest in property of the deceased spouse. Under such laws, if the decedent fails to make adequate provisions by will for the surviving spouse, the surviving spouse may reject the will and elect to receive such interest in the decedent's property as the law of the state authorizes. The purpose of these laws is to assure that a surviving spouse not be left destitute or unduly deprived of an income or property interest.

The provision in ILCA for a life estate in the surviving non-member spouse or children springs from the same concern. The present blanket provision in ILCA appears overly broad. On the other hand, the proposed amendment may be unduly restrictive. It should be noted, however, that even if the amendment were adopted, it merely establishes a minimum Federal entitlement. Tribes, through enactment of their tribal codes, could provide broader rights to life estates if they so desired.

C. A third amendment has been proposed which would appear to have been implicit in the authorization of tribes to enact inheritance codes; that is the authority to establish their own laws of descent and distribution, thus establishing a tribal definition of "heirs" (those entitled to receive property in the absence of a will) to replace "heirs" as defined by state law. This issue was not discussed in the July 26, 1983, hearing, perhaps because it was assumed the existing Act vested such authority in the tribes. A strict reading of Section 206 of ILCA, however, would indicate that the only authority granted the tribes is to limit rights of inheritance of non-Indians or non-members; not the authority to supplant state laws of descent and distribution with tribal laws.

In this context, it should be noted that the laws of the states do not favor escheat of property in the absence of a will. As a result, the laws of the states extend rights to inheritance to the most remote of relatives. Escheat of property to the state occurs only in the rarest of circumstances. In contrast, particularly in cases of fractional interests, both the tribes and the United States have an interest in limiting the class of heirs that might be entitled to inherit. Authorization for tribes to enact their own laws of descent and distribution to

establish their own definition of "heirs' (those who take in the absence of a will) would appear to be highly desirable.

6. Escheat.

Of all of the provisions of ILCA, the provisions of Section 207 providing for escheat of minor fractional interests in land is by far the most controversial. Section 207 of ILCA provides for escheat to the tribe of fractional interests of 2% or less in a parcel of land when such interest has earned less than $100.00 in the preceding year before it is due to escheat. Amendments proposed for this section range from recommendations for (1) simple repeal; (2) establishing a tribal option on application of the provision to any particular tribe; (3) exemption of mineral and timber interests from escheat; (4) exempting the application of the provision to interests in land that are bequeathed by will; (5) increasing the time period prior to death in which the property has earned income.

The problem of fractionation of ownership of individually owned trust and restricted land has long been recognized and is discussed at length in the introductory portion of this memorandum. The extent of this problem is clearly revealed by statistics submitted to this Committee by the Bureau of Indian Affairs reflecting ownership patterns in lands in the Portland, Billings, and Aberdeen Areas. These statistics reveal an extremely high percentage of heirs who own interests in a tract of land that is less than 2%. At Colville, 47% of the people listed by the BIA as having an interest in a parcel of trust or restricted land have an interest of 2% or less; at Yakima, 48%; at Fort Peck, 44%; at Blackfeet, 51%; at Crow, 52%; at Wind River, 67%; at Fort Berthold, 44%; Standing Rock, 48%; Pine Ridge, 51%; and, at Rosebud, 56%. (Hearings, p. 10). The problem is clearly staggering and simply must be addressed.

The underlying assumption of the Section 207 provision for escheat is that an interest of 2% or less in any parcel of land which has earned less that $100.00 in the preceding year before it is due to escheat is simply without economic value. This assumption was challenged in the hearing, particularly where minerals or timber may be involved. From the standpoint of the Administration, the driving force for eliminating these minimal interest is clearly to reduce the costs of administration of Indian lands. The examples cited in the introductory section clearly show the negative cost-benefit ratio for continued administration of interests with apparent minimal value.

It is interesting to note that among the alternatives to Section 207 as currently enacted that were considered by the Department of the Interior were provisions that would have presumed that any fractional interest of 2% or less in a parcel of land had a value of $250.00 or less. (See, Hearing, p. 9). The Department, at that time, was unable to estimate the number of interests that would be escheated annually and the estimated value of such interests. They noted that the Act had only been in effect since January of that year. (Hearing, p. 9). However, in response to the Committee's inquiry, the Department did provide the Committee with figures reflecting the number of interests that were escheated from January, 1983, when the Act went into effect, August 26, 1983. (Hearing, p. 22). These interests total 2,145. If each of these interests were assumed to have a value of $250.00, the total value of the escheated interests over this eight month time period would amount to $531,250.00.

In testimony before this Committee on July 26, 1983, John Fritz, Deputy Assistant Secretary for Indian Affairs, stated that the concerns of tribal leaders that were conveyed to him and Assistant Secretary Ken Smith essentially involved the problem of payment. (Hearings, p. 21). Although the Constitutionality of Section 207 of ILCA has thus far been upheld (Irving, et al. v. Watt, Civ. No. 83-5139, D.S.D., W.D., Opinion, Dec. 15, 1983), nevertheless a feeling persists that people are being deprived of property without due process of law or just compensation. In light of the apparent cost savings to the Government through escheat of these de minimus fractional interests, it would seem that consideration should be given to development of an amendment to provide compensation to heirs whose interests are being escheated. This would eliminate a great deal of the controversy currently surrounding this issue.

It appears that among the reasons for rejection by the Department of the notion of compensation were problems and costs associated with conducting appraisals. (Hearing, p. 8; see also examples cited in Introductory section of this memorandum). A ready solution to this problem would be to statutorily fix an assumed value ($250.00 for an interest between 1% to 2%; $125.00 for an interest of 1% or less) which would be subject to rebuttal evidence. This would eliminate the need for appraisals; would provide compensation to heirs; and would acomplish the salutory objective of eliminating these small fractional interests and consolidating the tribal land base. The net effect would be a

substantial savings to the Government as well as enhancement of the capacity of the tribes to manage their lands.

Turning to the proposals for amendment that were offered at the July 26, 1983, hearing, the recommendation for simple repeal of the provision for escheat would leave the whole issue of fractionation of ownership of individual trust and restricted land unaddressed. There is a history of 100 years of a mounting problem and 50 years of legislative frustration in addressing the issue. The problem has been the subject of continuous complaint by tribal leaders, economists, and legislators. To retreat from the first faltering steps toward correction reflected in enactment of ILCA is simply to retreat into the policy void of the past.

Some tribes have urged that Section 207 be amended to allow tribes to reject its provisions. One of the theories advanced in support of such an amendment is that for those tribes for whom special legislation has already been enacted, they already have in their laws provisions for escheat.

A common provision in these special laws enacted at the request of individual tribes for the governance of inheritance of trust or restricted lands is a limitation on the rights on non-Indians or non-members of the tribe to inherit. This provision usually is conditioned upon the obligation of the tribe to pay fair market value for the interest that is subject to the restriction. Otherwise, the interest will descend under other applicable law. These provisions are best described as a "voidable inheritance"; the avoidance of the inheritance is conditioned upon the affirmative act of the tribe in paying fair market value for the interest. These provisions are not technically escheat laws though they do provide for tribal acquisition of an individual's interest with or without his or her consent. More importantly, these provisions do not reach the problem of inheritance of fractional interests of members of the tribe.

The proposal to eliminate mineral or timber interests from the escheat provision is that a 2% interest in realty may well have a significant value if the resource is later exploited. The contention is that the measure of productivity of the land now contained in ILCA, i.e., that the interest did not earn $100.00 in the preceding year before it is due to escheat, is simply not a fair measure of the value of the interest. Wayne Nordwall of the Department of the Interior Solicitor's Office, indicated that

this problem might be addressed by extending the period of time over which the property interest should generate $100.00 from the one year time limit now in Section 207 to five to seven years. (Hearing, p. 9). While this might reduce the number of interests that might be escheated, it would still not seem to address the problem of timber or mineral reserves which may be known to exist but have simply not yet been exploited. It was recommended that Section 207 be amended to exclude from the escheat provisions timber and mineral reserves. However, such an amendment would not solve the problem of elimination of fractional interests and the attendant record keeping.

Both the 2% figure and the time limit for generation of income are arbitrary. The underlying assumption for selection of these figures is that an interest in land of this magnitude is simply without economic value. However, as shown by the discussion of timber resources and minerals, such an assumption may not be justified. In addition to unexploited resourcees, other considerations, such as proximity to an urban area might well effect the value of the interest. Under these circumstances, it would appear that consideration should be given to amending Section 207 to provide that the limited fractional interest coupled with the lack of income generation over preceding one or five years shall give rise to a presumption that the interest in the property is without significant economic value, but that such presumption is rebuttable, and the property shall not escheat if the presumption is rebutted. In addition, such amendment should require that the Administrative Law Judge probating the estate should consider timber or mineral resources known to exist on the property in reaching a determination of the value of the interest.

Salt River
PIMA-MARICOPA INDIAN COMMUNITY
ROUTE 1, BOX 216 / SCOTTSDALE, ARIZONA 85256 / PHONE 949-7234

IN REPLY REFER TO:

July 24, 1984
RECEIVED JUL 30 1984

The Honorable Mark Andrews
Chairman, Select Committee
on Indian Affairs
724 Senate Hart Office Bldg.
Washington, DC 20510

Dear Senator Andrews:

I am in receipt of your letter of July 17, 1984 in regard to the second scheduled hearing on H.J. Res. 158, a bill to amend the Indian Land Consolidation Act. As President of the Salt River Pima-Maricopa Indian Community, and at the direction of the Salt River Pima-Maricopa Indian Community Council, I testified before the Senate Select Committee on July 26, 1983 in regard to H.J. Res. 158. Copies of my testimony were made part of the record at that time.

I have examined the memorandum attached to your letter of July 17, 1984. The Salt River Pima-Maricopa Indian Community is fully in accord with the position taken on page 23 of the memorandum wherein it is indicated that section 206 of the Indian Land Consolidation Act ought to be amended so that

> "The authority of the tribe to enact ordinances should extend to all trust or restricted land within the tribe's reservation or jurisdiction and should not be limited only to the interests of their own members."

On behalf of the Salt River Pima-Maricopa Indian Community I urge you and the other members of the Select Committee On Indian Affairs to enact an amendment to section 206 of the Indian Land Consolidation Act which would recognize the authority of tribes to enact ordinances which would affect all of the land within the tribe's reservation and not just members' land.

I thank you for your invitation to testify at the hearing of July 31, 1984, but, because I have earlier testified I thought that a reiteration of the Salt River Pima-Maricopa Indian Community's position in this letter would suffice.

Yours very truly,

SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY

Gerald Anton
President

GA:km

DANIEL M. ROSENFELT & ASSOCIATES
ATTORNEYS AT LAW
1516 SAN PEDRO, N.E.
ALBUQUERQUE, NEW MEXICO 87110
TELEPHONE 505-268-3106/268-2429

DANIEL M. ROSENFELT
ROBERT T. REEBACK

July 24, 1984

RECEIVED JUL 3 0 1984

The Honorable Mark Andrews
Select Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Re: Indian Land Consolidation Act, P.L. 97-459

Dear Senator Andrews:

I understand that the Select Committee on Indian Affairs is considering amendments to the Indian Land Consolidation Act, P.L. 97-459. Having formerly served in the Solicitor's Office in Window Rock, Arizona where I was responsible for legal issues arising on the 3,000 allotments in Eastern Navajo Agency, I wish to offer two suggestions for your consideration.

First, the provision in Sec. 207 that a fractional interest escheat to the Tribe unless it has earned through its owner more than $100 in the preceding year is inequitable and administratively unworkable. Some interests, with considerable value, may not generate revenue every year. Also, accounting problems arise in determining the proper year to credit earnings of an interest. It would seem more reasonable to require that the Secretary of the Interior certify that the interest is not capable of earning the required minimum revenue.

My second suggestion concerns the need for express authorization of private trusts to administer fractionated trust interest. In the Eastern Navajo Agency, and I suspect elsewhere in the United States, many individuals hold several small interests in a number of allotments. While each interest is small and may be subject to escheat under section 207, the interests in the aggregate are somewhat larger. The interests are difficult to administer because it is necessary to bring all interest holders together to lease or make other productive use of the property.

One measure which would encourage and facilitate the productive use of fractionated allotment interests would be the authorization of private trusts. I would suggest the following language:

> Each interest holder of an interest in any tract of trust or restricted land is hereby authorized to convey the interest to a private trustee subject to the approval of the Secretary of the Interior.
>
> The Secretary shall within 180 days of the enactment of this section promulgate regulations governing the conveyance of interests in trust or restricted lands to private trusts.

While I was in the Field Solicitor's Office in Window Rock, I had occasion to research this question and found that existing law does not authorize the conveyance of restricted interests into private trusts. I also found that there was considerable interest among individuals holding fractionated allotment interests in having family or private trusts. Finally, it was my clear impression that the present system for administering fractionated interests is grossly inefficient and expensive to the federal government. If it were possible to encourage individuals to place their small interests in private trusts, great efficiencies could be realized by all concerned.

I would appreciate any consideration you could give to these suggestions. Thank you very much.

Very truly yours,

Daniel M. Rosenfelt

DMR/djd